SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1539
1540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABBOTT, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION FOR EXPEDITED REVIEW, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

MOTION FOR EXPEDITED REVIEW, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

Petitioners pray for the issuance of a writ of certiorari,** to review determinative orders of the Court of

* An application to vacate the circuit court's stay of preliminary injunction has this day been presented to Mr. Justice Harlan, Circuit Justice.

** This Court has allowed argument on petitions for certiorari, particularly in cases where there is a pressing necessity for a prompt determination. See, e.g., *Acron* v. *Cooper*, 358 U.S. 27 (1958).

Appeals for the Second Circuit, entered on June 11 and 16 Appendix (66A), after expedited consideration of respondents' appeal from a preliminary injunction issued by District Judge Weinstein (Eastern District, New York) Appendix (64A). The *per curiam* orders of Circuit Judges Lumbard and Hays, Judge Feinberg dissenting, stay indefinitely the preliminary injunction enjoining New York from severely reducing, as of July 1, 1969, subsistence grants to some 850 thousand needy children and their parents under the Aid to Dependent Children program, *infra,* and deny petitioners' motion for an appropriate order disposing of the expedited appeal.

Petitioners also pray that this Court note the urgency and national importance of the federal statutory issue herein presented and afford expedited review during the closing days of this term of Court.

OPINIONS BELOW

The opinion of the one-judge district court in support of the preliminary injunction is not reported and is set forth in the Appendix (14A). The District Court's Order is set forth at (64A). The order of the Court of Appeals is set forth at (66A). The Court of Appeals has not rendered any opinion on the order which is here sought to be reviewed.

JURISDICTION

The judgment of the District Court granting preliminary injunction in favor of petitioners was entered on May 16, 1969. Appendix (64A). That day the District Court denied the respondents' motion for a stay. Appendix (64A). Respondents docketed an appeal to the Court of Appeals on May 19. The stay of the District Court injunction by the Court of Appeals was granted June 11. Appendix (66A). The Circuit Court declined to vacate its stay or issue a final judgment after motion and hearing on June 16. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), providing for the granting of a writ of certiorari upon the petition of any party before or after rendition of judgment by the Court of Appeals.

QUESTIONS PRESENTED

Petitioners' complaint in the District Court sought to enjoin the implementation of a New York statute setting forth standards of assistance for Aid to Families with Dependent Children which reduced substantially the grants paid in New York City and reduced even further the grants in other areas of the State to 850,000 AFDC recipients on the grounds that the statute violated 42 U.S.C. 602(a)(23) requiring that by July 1, 1969, AFDC standards and grants be increased to reflect the rising cost of living, and that the discrimination against residents of Nassau County violated the Equal Protection Clause of the Fourteenth Amendment. A three-judge court was convened and found that it had been properly convened under 28 U.S.C. § 2281. Subsequent to final argument on both claims be-

fore the three-judge court, the state statute was amended giving the respondent discretionary power to correct the geographical discrimination. The three-judge court thereupon immediately dissolved itself stating that the constitutional claim was now moot or unripe or that petitioners had failed to exhaust state remedies and remanded the case to the single district for appropriate proceedings.

(1) Did the District Court abuse its discretion in retaining jurisdiction over the pendant wholly federal statutory claim, where the initially substantial constitutional claim conferring jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) was dismissed after final argument and submission of all claims?

(2) Did the District Court properly find that 28 U.S.C. § 1331 provides an alternative basis for federal jurisdiction of claims arising under the Social Security Act where the plaintiffs have in good faith alleged and shown that the monetary value of the federal right asserted and in controversy exceeds $10,000 for each AFDC family, exclusive of interest and costs?

(3) Does New York Social Services Law § 131-a substantially reducing the standards of assistance and grants paid for Aid to Families with Dependent Children as of July 1, 1969 violate the plain commands of Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), requiring an increase by July 1?

(4) Under this Court's decision in *King* v. *Smith*, 392 U.S. 309 (1968), is a justiciable controversy presented where recipients of Aid to Families with Dependent Children seek to redress injuries caused to them by the failure of state officials to comply with the fundamental plan

conditions of the Social Security Act while continuing to accept the substantial federal funds given in exchange for a commitment to comply with those federal conditions?

STATUTES INVOLVED

Section 402(a)(23) of the Social Security Act of 1935, added January 2, 1968 (42 U.S.C. § 602(a)(23)) provides:

> Sec. 402. (a) A State plan for aid and services to needy families with children must
>
> * * *
>
> (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Ch. 184, L. 1969 (March 31, 1969) of the State of New York provides in pertinent part:

> Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.
>
> * * *

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter.

* * * *

§ 5. Such law is hereby amended by adding a new section, to be section one hundred thirty-one-a, to read as follows:

§ 131-a. Maximum monthly grants and allowances of public assistance. 1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two

items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Any such social services district shall be permitted, with the approval of the commissioner, to adopt a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to the above limitations, for all items of need, exclusive of shelter and fuel for heating, if on application to the department made by the social services official thereof with the approval

of the appropriate local legislative body, such district establishes to the commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department.

5. In order that the legislature may, from time to time, consider adjustments to reflect changes in the cost of living, the board and the department shall annually make an appropriate report to the governor and the legislature, which report shall include the recommendations of the board and the department relating thereto.

6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provision for the replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made.

Ch. ——, L. 1969 (May 9, 1969) of the State of New York provides:

Section 1. Subdivision four of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby repealed, and a new subdivision four is hereby inserted in lieu thereof, to read as follows:

4. Provided it accords with federal requirements, the regulations of the department shall provide that

the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

§ 3. This act shall take effect July first, nineteen hundred sixty-nine, except that section two of this act shall take effect immediately.

STATEMENT OF THE CASE

This case grows out of the need to determine the scope and force of a federal statute affecting hundreds of thousands of needy children and billions of dollars of welfare expenditures. A chronological statement of the operative events shows what is urgently and fundamentally at issue in this lawsuit.

Recognizing that the federal purpose of protecting the economic security of needy children through Aid to Families with Dependent Children (AFDC) was being undermined by disturbingly inadequate grants in all states and that

rising welfare rolls threatened even further reductions, Congress in January, 1968, imposed a significant federal requirement on the states for "increasing income of recipients of public assistance." Sen. Rep. 844, 90th Cong., 1st Sess. (1967). In this departure from the 32-year old policy of allowing states wide latitude in determining standards of need and amounts of payment under AFDC, see, *King* v. *Smith*, 392 U.S. 309 (1968), Congress mandated as a plan condition for continued state participation in AFDC that the states increase the prices of all items contained in their own defined standard of need in force on January 2, 1968, to reflect fully changes in living costs up to July 1, 1969, and to adjust grant levels accordingly. Section 402(a)(23), P.L. 90-248, Social Security Amendments of 1967, 42 U.S.C. §602(a)(23).

The statute, on its face and from its legislative history, represents an interim step, a holding action so to speak, against foreseeable deterioration in grant levels, to allow needed time for consideration of more comprehensive changes in our national welfare system. Congress' specific concern was that states presently would respond to the rising AFDC case load by reducing assistance grants which were already at or below minimum subsistence levels. The Congress thus stabilized prevailing grant levels and forbade anticipated reductions, while allowing the states ample time to July 1, 1969, to make the substantial legislative and administrative adjustment* (45A-49A).

The cost of living rose in New York 10.1% from the time of the last adjustment of AFDC need standards in May

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* "The only reason why the delayed effective date is necessary is to give States an opportunity to change their state plans without taking away from them in the meantime the federal matching

1968, to July 1, 1969 (28aa).* Rather than increasing grants to meet the inflationary spiral, the New York legislature, in March, 1969, repealed long-standing authorization to Respondent to make yearly increases for rising living costs and to set grant levels "in accordance with standards of health and decency in the community," New York Social Services Law § 131, L. 1940, c. 619 § 7, amended by L. 1950, c. 364 § 2. In lieu thereof, the legislature itself established a reduced statutory schedule of grants based on the "costs of delivering the needs of recipients," and in explicit response "to the spiraling rise in welfare rolls and the expenditures therefor." New York Social Services Law § 131-a, L. 1969, c. 184 (March 31, 1969) (hereinafter Section 131-a). As the Governor described the Act: "My

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funds." 113 Cong. Rec. p. 16817 (Daily Ed., Nov. 20, 1967) (Remarks of Senator Harris).

The Department of Health, Education and Welfare (H.E.W.) issued regulations in July, 1968, and January, 1969, to guide and insure compliance by July, 1969. 33 Fed. Reg., p. 10230 (1968) and 45 C.F.R. § 253.20(a)(ii), 34 Fed. Reg., p. 1392 (1969). This compliance, predictably and characteristically in AFDC is not being had, and Petitioners know of suits now pending in at least four states, besides New York, to obtain the result Congress mandated by July 1, 1969.

A three-judge court rendered a preliminary decision in *Lampton* v. *Bonin*, —— F. Supp. —— (Civil No. 68-2092, E.D. La., April 21, 1969). Final argument has now been had in that case as well as in *Jefferson* v. *Hackney* (Civil No. 3-3012-B, N.D. Tex.) (three-judge) and *Thomas* v. *Burson* (Civil No. 2381, M.D. Ga.) (three-judge). A three-judge court has been convened in *Hodge* v. *Dept. of Public Welfare* (Civil No. ——, S.D. Fla.). Even H.E.W. acknowledges on admittedly partial information that many states will not be in compliance with 402(a)(23) on July 1, 1969.

* The record in this Court consists of the Appendixes of the Appellants and Appellees prepared for the Court of Appeals. Page numbers followed by "a" refer to Appellants' Appendix; those followed by "aa" refer to Appellees' Appendix. References to opinions below in the Appendix to this Petition are followed by "A."

proposal for limiting public assistance and care payments . . . will include elimination of the non-recurring special need grants [and] reduction of public assistance eligibility standards. . . ." *

During the 1969 legislative session, the Governor initially proposed an across-the-board 5% cut in all State expenditures. The cuts in most other areas were restored, but the AFDC budget for the fiscal year 1969-70 was cut even further by at least 13%, and perhaps 26%, from projected expenditures at current grant levels (28a-33a). This reduction in the State's 25% AFDC share compels a corresponding reduction in the 50% Federal matching funds and the 25% local share. The reduced statutory schedule, § 131-a, accommodates these budget cuts by reducing the amounts used to determine needs of families with older children and by abolishing entirely amounts to meet urgent, special or irregular needs, such as diets for diabetics and cardiacs, school lunch allowances, moving expenses and any replacement or initial purchase of clothing and home furnishings for all AFDC recipients in the State. For recipients outside of New York City, reductions in amounts and component items of essential need are even greater (23A-28A).

The same State budget for 1969-1970 which dictates severe reduction relies heavily on the 300-400 million dollars in federal AFDC funds paid to New York annually in exchange for the State's commitment to abide by the Federal Act. Without prior submission to H.E.W. for approval, Section 131-a was signed into law and the Respondent began steps toward full implementation through-

* Executive Budget for Fiscal Year April 1, 1969 to March 31, 1970, at 14 Doc. No. 48.

out the state by July 1, 1969, precisely the date on which Federal law commands increased grants to reflect current prices. On April 16, the Department of H.E.W., in uncharacteristically swift fashion, "questioned" the cutbacks in light of Section 402(a)(23) and the AFDC statewide uniformity requirement, and requested information from the State (130a). The Legislature, without responding to H.E.W., adjourned until 1970, thus insuring implementation of the cutbacks, regardless of H.E.W.'s ruling on conformity, since the Respondent has been firmly bound to the reduced statutory schedules.

On April 9, ten days after the enactment of 131-a, this lawsuit was commenced in the Eastern District of New York to obtain an adjudication of validity *vel non* of the grant reductions under the federal Social Security Act and the United States Constitution, and an injunction to prevent implementation of the statute. Pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343(3) & (4) and § 1331, the suit was brought by ten families on behalf of themselves and the 850 thousand other mothers and children in New York entirely dependent on AFDC grants for the very rudiments of life —food, shelter, clothing and household furnishings. The complaint charged that 131-a violated the Federal statute requiring a cost of living increase; additionally, that 131-a violated the Equal Protection Clause and the AFDC requirement of statewide uniformity, 42 U.S.C. § 602(a)(1), with respect to residents of Nassau County where living costs are at least equal and likely higher than those in New York City.

Both sides agreed in the district court before Judge Weinstein that authoritative determination before July 1 was essential, and the Court established a highly-expedited

schedule. Jurisdictional questions, stemming from Respondents' plethora of objections and the question raised by this Court in *King* v. *Smith,* 392 U.S. 309, 313, n. 13, were initially explored in depth and resolved on the controlling authority of *King* v. *Smith.** H.E.W. agreed to, and did, appear as *amicus curiae,* as did the City of New York and Nassau County. Although bearing an equal and greater financial burden, none of these *amici* opposed Petitioners' challenge to the welfare cutbacks. The views of the federal agency were fully before the court (51A-56A).

A substantial evidentiary hearing, including testimony by state and city welfare officials, was held on April 23 on the extent and impact of the reductions and the process of implementation. The State Welfare Department opposed preliminary relief on the ground that maintaining the current assistance levels, even without the federally-mandated repricing, would "require the state to pay out 10 million dollars each month more than the amount payable pursuant to the new schedule, pursuant to 131-a—an amount completely irretrievable once disbursed" (182aa-183aa), in view of the impoverished circumstances of the recipient children and parents. Substantial and uncontradicted testimony and affidavits by welfare officials and medical experts established that temporary or permanent reductions in the subsistence grants now provided to needy families would result in immediate, substantial, and

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* On April 15, Respondents moved to join the Department of Health, Education and Welfare as an indispensable party, arguing that despite *King* v. *Smith,* the only sanction against a state statute in conflict with the Social Security Act was cutoff of federal monies. H.E.W. strongly opposed the motion and it too was denied on the authority of *King* v. *Smith.* Appendix (1A).

likely permanent injury to physical and mental health and safety, particularly since current grant levels allowed for "marginal nutritional status" (163aa, 165aa, 25aa, 145aa, 132aa). The abolition of grants for medically-required diets and transportation posed very immediate hazards for certain vulnerable recipients.

It was further established that New York receives about $100,000,000 quarterly in federal funds for AFDC grants (30a), and that these federal monies, given in advance, would be utilized by New York after July 1, regardless of whether or not New York complied with the federal plan condition* These federal monies, too, are irretrievable once disbursed, there being no remedy for use of federal monies received under an invalid state plan.

Welfare officials agreed that a change from current grant levels to the new schedules would take from at least six to eight weeks to implement and somewhat longer to change back and that adjudication after full implementation for 850,000 recipients would create "sheer havoc" (117aa, 173aa, 194aa, 200aa). Although a special method allowing fully reversible steps toward implementation was available, it would not be used in the ordinary course of business (206aa).

On April 24, based on these findings, Judge Weinstein entered a temporary restraining order prohibiting the respondents from taking irreversible steps to implement the cutbacks and requiring the processing of applications for grants available under present state law in the ordinary course of business, some of which were being administratively denied in anticipation of the cutbacks. Ap-

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* H.E.W. Handbook of Public Assistance Administration, Pt. I, § 4230.

pendix (4A). A three-judge court (Moore, C.J., Mishler, D.J. and Weinstein, D.J.), quickly convened by Chief Circuit Judge Lumbard, continued the restraining order and expedited hearing on cross motions for summary judgment on both claims. These motions were supported by extensive affidavits, exhibits, statistical material and charts, official documents, as well as the prior testimony and exhibits in the case. Extended argument was had on April 30 in which Respondents renewed a plethora of jurisdictional objections to both claims, all of which seemed controlled by *King* v. *Smith,* approving three-judge court consideration of a constitutional and pendant Social Security Act claim.* On May 9, before the awaited decision of the three-judge court, the Respondent secured a discretionary power to increase the lower grant schedules for other parts of the state up to the reduced New York City levels upon an unspecified administrative finding that living costs so warranted. The three-judge court forthwith on May 12, without motion, notice to the parties, hearing, or argument, ruled *per curiam* that although it had been properly convened, the substantial constitutional issue before it was now either moot or unripe by virtue of this then-unexercised administrative discretion to reduce or remove the discrimination mandated by 131-a, and suggested that the Nassau County Plaintiffs institute state court mandamus proceedings to compel Respondents to remove the challenged discrimination against them. The court remanded the case to the single judge for appropriate proceedings, with the statement that

* However, presiding Circuit Judge Moore was openly antipathetic to hearing argument on the pendent federal statutory claim, stating that "The reason we as a three-judge court are assembled is that you believe there is some Constitutional objection to that which is proposed to be done." Tr. 53, Document No.

> "We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs." Appendix (12A).

The temporary restraining order was renewed immediately by Judge Weinstein. Petitioners moved to be heard by the three-judge court on the dismissal of the constitutional claim, since requiring exhaustion, under whatever rubric, is inappropriate in an action under 42 U.S.C. § 1983, *Damico* v. *California,* 389 U.S. 416 (1967) and *King* v. *Smith, supra,* and since the hasty disposition of the constitutional claim leaving the pendent statutory issue unresolved seemed contrary to the course of proceedings endorsed in many cases. *E.g., Siler* v. *Louisville & Nashville Ry. Co.,* 213 U.S. 175 (1909); *Florida Lime & Avocado Growers Inc.* v. *Jacobsen,* 362 U.S. 73 (1960); *Br. of Locomotive Engineers* v. *Chicago, Rock Island and Pac. Ry.,* 382 U.S. 423 (1966) and *King* v. *Smith, supra.*

This motion was pending on May 16, when Judge Weinstein transformed the T.R.O. into a preliminary injunction, supported by an extensive 64-page opinion, to allow New York an immediate interlocutory appeal to the Circuit Court. Appendix (14A). Federal jurisdiction was based on the pendency of the federal statutory claim to the constitutional claim, *King* v. *Smith,* and alternatively, on general federal question jurisdiction under 28 U.S.C. § 1331, the amount in controversy exceeding $10,000. Other jurisdictional bases were not reached. The exhaustive opinion analyzes in detail the impact and extent of the overall

reduction in AFDC grants of from 12% to 20% as the result of the new reduced grant schedules and standards of need. Appendix (39A-41A).* The court held that New York had, in all likelihood, breached its federal trust and the federal plan conditions by severely reducing grants and standards of assistance. It also found that harm to recipients from implementation of these cutbacks far outweighed any possibility of harm to the State from the injunction. Appendix (22A-25A).

The District Court denied a stay and sought to proceed swiftly to final judgment. The State declined to participate in further proceedings in the District Court during the course of the interlocutory appeal. On May 21, the Court of Appeals, Judges Lumbard, Feinberg and Timbers, after hearing, first granted, then denied the State's application for a stay but granted its motion for a preference, setting the case down for a hearing before a panel specially designated by Chief Judge Lumbard** on June 3, 1969, with

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* The district court rejected New York's multifarious explanations and defenses against the allegation that the large reductions in grant levels violated the plain federal mandate, such as: (1) the federal statute does not apply to New York at all since it offers relatively liberal welfare benefits; (2) the federal statute "expires" on July 1, 1969, its effective date; (3) the statute has no application in states, such as New York, which pay in full "the amounts used to determine the needs of individuals"; (4) certain needs met under AFDC are "totally gratuitous" and not a part of the amounts used to determine the needs of individuals; (5) New York complied with 402(a)(23) in establishing the current grant schedules in 1968 and the new Section 131-a represents no reduction; and (6) even if the new law reduces grants, this is justifiable because the elimination of grants to meet the needs of older children and other non-universal needs, particularly those dictated by health conditions, was a simplification, Appendix (43A-55A).

** Circuit Judge Moore, the presiding judge on the three-judge district court panel, was specially designated to sit on the circuit

briefs and appendices due within six days for each party. The Court of Appeals indicated that the court below could continue to move toward summary judgment and encouraged the parties to cooperate with the scheduling of the District Court. On June 4, after full briefing and argument before the special panel, that Court again denied the motion for a stay on the ground that final decision would be rendered forthwith. On June 5, the following day, the three-judge court denied Petitioners' pending motion for a hearing on the dismissal of the constitutional claim.* The next day, June 6, the Respondent issued proposed regulations slightly increasing schedules for some counties outside New York, but leaving a substantial disparity between grants to recipients in Nassau County and New York City. The invidious geographical discrimination thus remains. Petitioners immediately brought this to the attention of the now moribund three-judge court, which took no further action after denying the rehearing motion. Respondents finally responded to H.E.W.'s request of April 15 for information by submission of these regulations on June 5. H.E.W. has not responded to date.

On June 11, 1969, the Court of Appeals *sua sponte* granted the twice previously denied motion for a stay of the injunction, noting that due deliberation of the appeal was now had and that opinions would follow in due course. Appendix (66A). Judge Feinberg dissented. New York is

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court panel, along with Chief Judge Lumbard and Judge Feinberg, two of the judges who heard the initial application for a stay and preference. To insure a validly consolidated panel, Petitioners reluctantly brought 28 U.S.C. § 47 to the attention of the Court. Thereupon Chief Judge Lumbard designated Judge Hays to sit.

* Petitioners were not informed of this action by the three-judge court until June 11.

now proceeding full speed to implement the new grant schedules by July 1. In response to Judge Weinstein's proceeding to enter summary judgment by June 18, New York sought an order staying proceedings in the District Court, which was denied by Judge Weinstein on June 12, granted by the Court of Appeals *ex parte* on June 13 and vacated after hearing on June 16.* Petitioners' simultaneous motion to the Court of Appeals to enter an order reflecting their apparent decision on the appeal, with opinions to follow in due course, so that review would be clarified in this Court, was denied, as was Petitioners' application to vacate the critical stay.

With a determinative stay of the injunction, final dissolution of the three-judge court, and refusal by the Court of Appeals to enter an order, Petitioners are without a forum, save this Court, for any review before full and well nigh irreversible implementation of the reduced grant schedules for 850,000 AFDC recipients.

* The denial of the stay of proceedings in the district court restricts the issuance of any further injunctive relief upon final judgment.

MOTION TO EXPEDITE: TO PREVENT NEW YORK FROM VIOLATING ITS FEDERAL TRUST AND THEREBY CAUSING IRREPARABLE INJURY TO 850 THOUSAND NEEDY CHILDREN AND MOTHERS, AN EXPEDITIOUS FINAL DETERMINATION OF THE ISSUES PRESENTED MUST BE HAD. ALTERNATIVELY THE STAY ISSUED BY THE SECOND CIRCUIT MUST BE VACATED.*

A. *Irreparable Injury to Petitioners*

The substantial and uncontroverted evidence in the record shows that the present standards of assistance to needy families in New York is below the minimum requirements compatible with health and decency. Eminent officials charged with the administration of public assistance in New York, such as Mitchell Ginsberg, Commissioner of the Human Resources Administration, and Jack Goldberg, Commissioner of the New York City Department of Social Services, serving 675,000 of the 850,000 AFDC recipients, testified that "the present standards of assistance provide for life on a level of sustenance, nothing more, and often less," and that "we have not met the minimum standard that people need in this city to maintain themselves." Transcript, April 23, Document No. 61, pp. 76, 87-106, 108, and Appendix (22A, § 42A). The stringent food budget was said to be the only available resource recipients could use

* An in-chambers application is being made to Mr. Justice Harlan, Circuit Justice for the Second Circuit, to vacate the stay as interim relief pending a decision or order on the injunction in the Second Circuit and the within proceedings in this Court. The stay requested herein is in the event that Mr. Justice Harlan refers the in-chambers application to the Court or in the event the Court wishes to consider the stay request as an integral part of the within application to expedite.

to meet essential needs of clothing and home furnishings now unbudgeted under the new law. Prominent professors of medicine, doctors, social workers and others dealing with New York's AFDC recipients attested that gross nutritional deficiencies and the grievous and permanent consequences of such deprivation were commonplace among AFDC families in New York. These are the stark facts of subsistence or below-subsistence life (142a-158a).

In light of this uncontradicted evidence, the District Court found that families "are at or below a bare subsistence level . . . (and) a reduction in welfare benefits putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits." Appendix (22A). It may also "irreversibly retard mental and physical development . . ." Appendix (22A). These findings have not been disturbed on appeal. If it is ultimately found that the New York reductions do indeed violate Petitioners' rights under the federal mandate, there is nothing which any Court or any agency can do to repair the grievous injuries illegally inflicted upon these needy children. The money lost will not be repaid, for there is no law, federal or state, requiring in these circumstances retroactive payment of grants improperly withheld or reduced in violation of a Social Security Act command.* Furthermore, money cannot repair or ameliorate the permanent mental and physical injury caused an unborn child because his mother did

* Under both H.E.W. Regulations and New York law, retroactive payment of grants wrongfully reduced or withheld is available only when the recipient has made timely request for and prevailed in an administrative "fair hearing." 18 N.Y.C.R.R. § 352.5 (N)(b); Handbook of Public Assistance Administration, Part IV, § 6300(g).

not have an adequate diet, for the destruction of a family unit resulting from physical deprivations, or for educational retardation from nutritional inadequacy. These all too likely injuries to tens of thousands of vulnerable needy mothers and children in New York will indeed be irremediable.

B. *Violation of New York's federal trust*

It is true that needy children in many other states receive less assistance than children in New York and that even now these children suffer the irreparable harms and deprivations that petitioners here seek to prevent in New York. Whatever one may personally feel about this, a needy child in the United States has no traditional right under our Constitution and laws to be saved from the grievous and permanent injury which results from malnutrition, physical deprivation, and educational retardation. As a partial and modest response to this stark fact, Congress enacted Section 402(a)(23). Petitioners believe and the District Court and H.E.W. agree, that in light of the 10.1% increase in living costs in New York, this federal plan condition prohibits these harmful reductions of subsistence grants. This finding too still stands undisturbed, and will stand after the appeal is disposed of on dubious jurisdictional grounds. 402(a)(23) also prohibits reductions in other states, which are now following New York's lead. Thus, the issue is not the humanitarian one whether the state is free to cause irreparable injury to needy children by refusing the basic sustenance of life. It is whether New York may do so in violation of a specific federal command, while continuing to use very considerable federal monies given in exchange for New York's pledge to obey these federal commands.

These monies, once disbursed, cannot be recovered. Although unique among federal regulatory programs, the use of federal monies whilst in violation of the federally imposed conditions is traditional and commonplace in the AFDC program, a program with a notorious history of non-compliance and non-enforcement by H.E.W. or the courts, federal or state. H.E.W. has, for well-known reasons, been quite unable to obtain compliance by the regulated group, the states, as attested to by the years of protracted and relatively ineffective negotiations during which federal monies continue to flow.* The only remedy at its disposal —cutoff after years of fruitless exhortation was tried but once and that in 1938.** The brutal facts of subsistence life do not permit the luxury of time.

Until recently, recipients, the persons protected by the plan conditions in 402(a)(1)-(23) were without the wherewithal to commence actions in federal courts to secure these federal rights. While the subject matter of these suits—conflicts between state and federal law—is not new to the federal courts, that these suits are not well received

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* The widespread failure of states to comply with the mandates of the Social Security Act results partly from the passive and conciliatory role taken by H.E.W. As State Commissioner King succinctly stated in *King* v. *Smith, supra,* Appellants' Reply Brief at 15, "the Federal Government has never had enough guts themselves to define what a substitute parent policy would be." See also, W. Bell, Aid to Dependent Children (Colum. Univ. Press 1965), pp. 71-73; *King* v. *Smith, supra,* 392 U.S. 317 at n. 12.

** See, Altmeyer, *The Formative Years of Social Security* (Univ. of Wis. Press 1968), pp. 75-83. H.E.W. has acknowledged for over two years that New York's fair hearing rules are out of conformity with the federal Act, but still the agency refuses to even order a conformity hearing, on the grounds that hearings will be held only when "deficiencies in the State's public assistance program are so serious, and attempts to obtain correction are so unpromising, that the Federal payments must be withdrawn . . . ." Letter of May 6, 1969, to Richard Flaster from Robert H. Finch, Record, Document No. 51.

where gross violations demand substantial relief is seen in the curious and hasty disposition of the constitutional claim and dissolution of the three-judge court, cf. *Florida Lime & Avocado Growers Inc.* v. *Jacobsen*, 362 U.S. 73, (1960), and in the fact that both the Circuit Court and the three-judge district court apparently believed that the enforcement of AFDC, alone among scores of federal regulatory programs, was not an appropriate matter for the federal courts.

Thus, what is at issue here is whether there can be effective enforcement of federal commands duly enacted in our national legislative process, in which the states are not an unheard voice. This Court's decision in *King* v. *Smith* was a major step in answering this question affirmatively. But it is not being so read below. The State persistently sought to have that decision limited strictly to its facts, arguing alternatively that: (1) the federal courts were available only where the district court initially invalidates the welfare rule on constitutional grounds (B. 39);* (2) the regulation in *King* was not part of Alabama's state plan for AFDC (B. 41); (3) *King* does not apply to state statutes (B. 42); (4) H.E.W. had approved the substitute father rule in *King* (B. 47) even though this Court said the opposite, 392 U.S. at n. 23; (5) and that "aid to all eligible individuals" does not mean the aid required by 402(a)(23). The Court of Appeals seemingly shared some of these doubts.

The impunity and disregard with which even New York, a leadership state in welfare matters, regards the federal commands to protect poor people is seen in the manner in which these reductions were effectuated. In the teeth of a

* Appellant's Brief, Court of Appeals.

federal statutory command, the legislature took unto itself the task, previously left to the respondent, of setting grant levels, abolished respondents' power to make the cost of living adjustment for this very year, and reduced grants without any prior submission to H.E.W. of this major revision in the state AFDC plan.

The reduced grants mandated by the statute were "deemed to make adequate provision for all items of need." The Respondent was thus rendered powerless voluntarily to comply with the federal law even though H.E.W. has indicated that the cutbacks "raised a question of conformity" with Section 402(a)(23) (130a). In this context, negotiation with H.E.W. is a ritual signifying nothing, and other states now follow New York's regrettable lead on the "requirements" of 402(a)(23). Only this Court can prevent the impotency of AFDC federal commands from being once again unconscionably confirmed.

This assuredly is one of those unusual cases in which the legitimate interests of either party and the national interest may be vindicated only by a prompt, authoritative determination of the merits of the claim. It has been so treated by both the District Court and the Circuit Court until the Circuit Court's stay without opinion or judgment on June 11 and refusal to vacate on June 16. This stay effectively determines the case, but not the merits.

New York says, and it is true, that to require continued payments at the present rates will cost some 10 million dollars a month more than Section 131-a. This is a considerable amount of money, to be sure, but it also is very telling, if not conclusive, evidence that implementation of Section 131-a will not be in compliance with § 402(a)(23)

on and after July 1, 1969. If preservation of the *status quo* costs $10,000,000 in grants each month it ineluctably follows that the grants payable under 131-a are not equivalent to present standards and certainly do not "reflect fully changes in the cost of living." Further, reversion to the *status quo* after implementation could not be done with all deliberate speed in less than eight to twelve weeks, perhaps longer, and with enormous administrative expense and dislocation.

In situations such as this, the overwhelming national interest and prevention of serious harms require prompt and final decision by this Court. See cases listed in Rule 20 of the Supreme Court Rule, *Williams* v. *Rhodes,* 37 U.S.L.W. 4001 (1968); *Hannah* v. *Larche,* 361 U.S. 910, 363 U.S. 420; *Aaron* v. *Cooper,* 358 U.S. 27, 1 (1958); *Wilson* v. *Girard,* 354 U.S. 524, 928 (1957). Without derogating the monetary interests asserted by, for example, the steel companies in *Youngstown Sheet and Tube* v. *Sawyer, supra,* the right of Negro children to attend Central High School in Little Rock in the Fall of 1958 (*Aaron* v. *Cooper*) or the right of the Civil Rights Commission to resume hearings (*Hannah* v. *Larche*), Petitioners urge this Court to treat the interests set out above as similarly worthy of the extraordinary review requested.

C. *Finality of the proceedings below*

While this petition is addressed to the stay of a preliminary injunction, neither the case nor the 402(a)(23) issues are in a preliminary form. The case was fully briefed and argued on a very considerable and explicit record in the District Court and Court of Appeals. The

issues, both jurisdictional and substantive, were joined at the outset and there is no genuine dispute over any material or dispositive facts. There is also no lack of evidence supporting the findings underlying the injunction. As the Respondents put it in seeking a stay of further proceedings, "the preliminary injunction is for all intents and purposes a final judgment disposing of the entire 402(a)(23) claim."

In light of the Circuit Court's early endorsement of prompt further proceedings in the District Court and its later restriction on any further injunctive relief upon summary judgment, the predicate for reversal of the District Court is very much jurisdictional. Jurisdiction was the focus of the argument and issues considered in the Court of Appeals. That question is whether *King* v. *Smith* does or does not control this case. Review of the judgment of the three-judge court is sought since it bears on the jurisdiction *vel non* of the District Court under *King* v. *Smith*. This incorrect jurisdictional ruling should not be allowed to determine the outcome of this case solely because of the passage of time. The questions presented are accordingly appropriate for the prompt consideration and disposition of this Court.*

D. *Vacating of Stay***

Several reasons coalesce in this case to render the accepted deference to state law and processes inappropriate.

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* The fulsome briefs and record developed in the Circuit Court permit briefs to be filed in this Court within one week or less. Judge Weinstein will render final judgment on June 18.

** The following is included for the convenience of the Court in the event Mr. Justice Harlan wishes to refer the in-chambers application to the Court for disposition or in the event the Court deems expedition and stay inseparable applications.

First, the likely harms from implementation of 131-a are set out at length in the District Court's opinion. These harms cannot be remedied by monetary restitution, as recognized in numerous other AFDC cases.

See *Green* v. *Department of Public Welfare* (stay denied Sept. 1, 1967, Black, J.); *Harrell* v. *Tobriner* (stay denied Dec. 29, 1967, Brennen, J.); *Smith* v. *Reynolds* (stay denied Jan. 4, 1968, Brennen, J.); *Burns* v. *Montgomery* (stay denied May 10, 1968, Douglas, J.); *Kelly* v. *Wyman* (stay denied Jan. 10, 1969, Harlan, J.); *Williams* v. *Dandridge* (stay denied, Warren, C.J.); *Lampton* v. *Bonin*, —— F.Supp. —— (E.D.La. 1969).

Second, there is a very substantial likelihood that New York is, or will be, as of July 1, in very serious violation of the Social Security Act, and that New York has done precisely what Congress sought to prohibit in the federal stabilizing statute. As the New York Legislature candidly stated, the new statutory grants are based on "the costs of delivering the needs of recipients," and are necessitated by "the rising welfare rolls and expenditures therefrom." Section 131-a, New York Social Services Law.

Third, to be considered with this highly likely and serious violation, there is the enormous administrative change that will take place in implementing 131-a throughout the state and the substantial delay and administrative dislocation in a reversal to the current levels. Any interruption in the injunction permits New York to take these irreversible steps towards implementation, steps which are highly likely at this late date. Hence, it is critical to the possibility of effective relief upon adjudication that this interregnum created by the stay cease forthwith.

Fourth, there is the manner in which New York has treated its federal obligation under the Social Security Act in enacting these grant levels in statutory form and seeking to implement them without regard to conformity with federal mandate.

Fifth, because Petitioners sue to enforce the federal statute commanding the states to act in a federally-defined interest, Petitioners assert an independent national interest in having the AFDC program administered in accordance with the purposes and manner Congress specified. That national interest, expressed in 402(a)(23), is to prevent deterioration in grant levels because of rising welfare rolls and to prevent that by July 1, 1969. There is also the profound national interest in seeing that millions of dollars of federal monies are *not utilized where a state plan* is in plain conflict with the Social Security Act. New York does intend to utilize these monies. These interests are the public interest in this case and deserve weighty consideration.

Sixth, also to be considered here is the likely basis for the stay in the Court of Appeals, which is jurisdictional. Lack of federal court jurisdiction would be an incorrect holding for the reasons set out in Judge Weinstein's opinion. It simply is contrary to *King* v. *Smith, supra.* It also is a fundamentally unfair result, since it is based upon the dubious findings and dissolution of the three-judge court, those findings accepted as unreviewable in the Court of Appeals.

For these reasons, Petitioners believe there is a high likelihood of prevailing in this Court, which would automatically reinstate the injunction below. That reinstatement, after review in this Court, would be largely ineffec-

tive for months and would be administratively very expensive.

In sum, the Circuit Court has, at this very late but critical stage of this lawsuit, placed the risks and burdens pending adjudication on the backs of the Petitioners, and, we would add, the federal government. We submit that this burden has been misplaced. Since neither the Petitioners' very real interest in the rudiments of human life nor the national interest in the lawful and proper use of enormous federal monies can be effectively vindicated by adjudication long after implementation, this risk and burden, pending review in this Court, should be borne by the State.

In these circumstances established federal practice would appear to support Petitioners' application to vacate the order of the Second Circuit. This Court and individual Justices have traditionally acted to prevent irreversible acts by state officials which would raise "insurmountable practical problems . . . should the judgment [below] be reversed by this Court." *Williams* v. *Rhodes,* 89 S. Ct. 1 (1968) (Stewart, J. granting temporary order against Ohio election officials). Such "insurmountable problems" would certainly result if New York was permitted to implement its reduced budgetary standard.

Petitioners are seeking to preserve for review important questions regarding the effect of 402(a)(23) and, hence, of the entire AFDC program on a national scale. See, *McCleod* v. *General Electric Co.,* 385 U.S. 533 (1966), in which the Circuit Court stay was vacated because both the District Court and the N.L.R.B. believed preliminary relief necessary. Here, the District Court saw an overwhelming necessity for such relief, and H.E.W., though

not as straightforward as the N.L.R.B., found in the jargon characteristic of the agency that New York's reductions "raised questions" (130a).

The traditional standard of appellate review of district court actions under Rule 62(c) has been not to disturb the lower court's judgment unless there has been an abuse of discretion. 7 *Moore's Federal Practice* (2d Ed.) § 62.05. *Magnum* v. *Coty,* 262 U.S. 159 (1923). Under the circumstances outlined above, we submit that the Second Circuit has not made an adequate finding of such abuse. Indeed it has made no finding at all at this late critical stage. Nor will it enter an order to clarify proceedings in this Court. When it is impossible to say that the District Court abused its discretion, and when the granting of the preliminary injunction does not moot the ultimate issues, but indeed preserves them for consideration by this Court, it is entirely appropriate for the District Court's judgment to be enforced pending consideration by the full Court. *Public Service Board of Vermont* v. *U.S. Interstate Commerce Commission,* 87 S. Ct. 3 (1966). We believe these considerations warrant the vacating of the stay below.

THE TRADITIONAL REASONS FOR GRANTING CERTIORARI PLAINLY EXIST HERE

1. The substantive question presented in this case involves the application and enforcement of a significant provision in a federal regulatory program effective in fifty states. The rights at stake—the right of 5.6 million* needy children and mothers to receive modest increases rather than immodest decreases in subsistence grants—could hardly be more fundamental.** Even a slight increase in welfare grants is of monumental importance to a family living at the edge of subsistence; any decrease threatens the health and safety of large numbers of highly vulnerable children and families. The mandated increase in welfare grants is also a highly significant matter to the states, for even though grants to individual families are precariously low, collective welfare expenditures are large. In 1968, total expenditures, federal, state, and local, for AFDC grants were 2.7 billion dollars.*** A cost of living increase imposed on this figure is no mean amount.

2. Even though Section 402(a)(23) does not require increased assistance until July 1, 1969, and consequently there has been little occasion for judicial interpretation of

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* See, "Welfare in Review", U.S. Department of H.E.W., Vol. 6, p. 28 (September-October, 1968).

** This truly is a case raising "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Former Chief Judge Vinson, Work of the Federal Courts, Address to the American Bar Association, Sept. 7, 1949, 69 S. Ct. Reporter V, explaining the criteria for granting certiorari.

*** "Welfare in Review", U.S. Department of H.E.W., Vol. 6, p. 28 (September-October, 1968).

the federal statute, there already exists a substantial conflict between the interpretation given it by the Department of Health, Education and Welfare, on the one hand, and by the only two federal judges who have construed the federal provision on the other.*

3. The essence of what Congress intended to compel with 402(a)(23) and the fundamental national policy underlying it renders expeditious and authoritative application and enforcement imperative. Congress gave the states almost two years to comply with the federal mandate; the cost of living throughout the country has continued to spiral during that period; the provision is in its nature an interim and temporary solution to a grave and urgent problem; many states are not providing for the increases mandated by the statute, and indeed many states including New York are reducing grants despite the requirement of the federal statute and the rising cost of living. Such backsliding is in the teeth of a national legislative policy requiring progression. It is obvious that if the provision is to carry out the will of Congress and prevent the very evils Congress sought to avert, it must have effect immediately, not six to twelve months hence.

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* Although H.E.W. agrees with the district court that reductions in the level or content of the standards of need such as those effectuated in New York violate 402(a)(23), the federal agency would allow states to impose ratable or percentage reductions on the amount of aid paid, after upward adjustment of the standard of need. See, H.E.W. Amicus Brief, *Lampton* v. *Bonin*, Civ. No. 68-2092 (E.D. La. 1968) at p. 160a. The federal judges have rejected this interpretation as inconsistent with the plain language of the statute and as reducing the federal requirement to an exercise in futility. *Lampton* v. *Bonin, supra* (dissent, majority did not reach the issue).

4. Section 402(a)(23) represents a deliberate and obviously considered departure from the former policy, recognized by this Court in *King* v. *Smith, supra,* of allowing the states wide latitude in determining both standards of need and the amounts of payments under AFDC. In making the pricing adjustment a plan condition for continued participation in the AFDC program, Congress made unequivocally plain its intention to compel the states to make modest increases in AFDC payments. Since this new plan condition does represent a departure from the previous law leaving grant levels to state determination, it is not likely to be enthusiastically received by the states, *vide* New York. While H.E.W. has had a notable lack of success in enforcing the other plan conditions for participation in AFDC, such as condition number nine [now 42 U.S.C. § 602(a)(10)], enforced by this Court in *King* v. *Smith, supra,* any administrative enforcement of plan condition number twenty-three will be well nigh impossible. For obvious reasons, state welfare officials have much greater freedom to comply when H.E.W. "raises questions" about an eligibility provision or a rule concerning procedural remedies than when the federal agency questions the level of the state grant schedule for AFDC. It was in recognition of the fact that compliance with the federal statute could most reasonably be had through state legislative action that Congress allowed ample time for compliance. Yet at the very legislative session in which New York was to make the necessary adjustments, it ignored 402(a)(23) and reduced grants. If a state so tradi-

tionally enlightened with respect to welfare matters can thus eviscerate and avoid the plain requirements of the federal statutory mandate, the federal law provides little remedy or relief for other needy children around the country.

5. In view of the substantial concerns of both the recipients and the States in the proper construction and interpretation of Section 402(a)(23), this issue will be before this Court. Final argument on the substance of 402(a)(23) has already been had before three-judge federal courts in Texas, Louisiana and Georgia. But review and enforcement months after the target date Congress set is not only to undermine the purposes of 402(a)(23) but once again to tolerate the improper use of unrecoverable federal monies. Moreover, review months hence may render compliance in some states near impossible, because their legislatures have failed to establish the appropriate schedules or appropriate the amount necessary to administer AFDC in accordance with federal law. These problems are not insubstantial and the national interest in review now not inconsiderable.

CONCLUSION

The petition for a writ of certiorari and motion to expedite should be granted.

Respectfully submitted,

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June, 1969

SUPREME COURT U. S.

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JUN 17 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Appellants,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Appellants,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a three judge court of the United States District Court for the Eastern District of New York (Circuit Judge Moore, District Judges Mishler and Weinstein), entered on May 12, 1969 dismissing plaintiffs' claim under the Equal Protection Clause of the United States Constitution, dissolving the three judge court, and remanding the case to the single

district judge and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The order and opinion of the three judge court of the District Court for the Eastern District of New York is not yet reported. It is set forth in the Appendix (10a). The order and opinion of the Hon. Jack Weinstein, District Judge, convening the three judge court is not reported. It is set forth in the Appendix (4a).

Jurisdiction

This suit was brought under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331, 1343, 2201 and 2202 seeking declaratory and injunctive relief against a state statute of state-wide applicability on the grounds that it violated the equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment of the District Court was entered May 12, 1969 and rehearing was denied June 6, 1969. Notice of appeal was filed in that court on June 12, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b) and has been sustained by the following decisions. *Snell* v. *Wyman,* 393 U.S. 323 (1969); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 75 (1960); *United States* v. *Georgia Public Social Services Commission,* 371 U.S. 285, 287 (1963); *American Federation of Labor* v. *Watson,* 327 U.S. 582, 591 (1945).

Questions Presented

This suit affects 850,000 recipients of AFDC, involves some 10 million dollars per month, and a profound federal interest in compliance with paramount federal law. It was brought on April 9, 1969 under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343 and 1331 to enjoin, prior to July 1, 1969, the implementation of a New York Statute setting forth standards of assistance for Aid to Families with Dependent Children which reduced substantially the grants paid in New York City and reduced even further the grants paid in other areas of the State on the grounds (1) that the statute violated 42 U.S.C. § 602(a)(23), the federal Social Security Act, (2) that the discrimination against residents outside New York City violated the Equal Protection Clause of the Fourteenth Amendment. A three-judge court was quickly convened and found that it had been properly convened under 28 U.S.C. §§ 2281 and 2284 on the authority of *King* v. *Smith,* 392 U.S. 309 (1968). After submission of extensive evidence and briefing and final argument on both claims on cross motions for summary judgment before the three-judge court, the Respondent secured a discretionary administrative power on May 9, 1969 to correct the geographical discrimination on which the constitutional claim was based. The three-judge court thereupon immediately (May 12) dissolved itself, because of this unexercised administrative discretion, stating that the constitutional claim was now moot or unripe and that petitioners had failed to exhaust and remanded the balance of case to the single district judge for appropriate proceedings.

(1) Did the District Court properly dismiss this constitutional claim under 42 U.S.C. 1983 and 28 U.S.C. 1343(3)

because the petitioners had failed to exhaust possible state court mandamus remedies to correct the discrimination against Nassau County residents mandated by the terms of the state statute?

(2) Did the District Court properly find that where a self-executing state statute mandates a discriminatory result found to present a substantial constitutional question, the question becomes "moot" or "unripe" when an administrator is given a wholly-discretionary power of dispensation, then and now unexercised, to prevent the unconstitutional result otherwise required?

(3) Where the jurisdiction-conferring constitutional claim was deemed moot and unripe after final submission of evidence and final argument on cross motions for summary judgment, did the three-judge District Court err in declining to decide the pendent and dispositive federal statutory claim and thereby imply federal jurisdiction over the pendent claim had been extinguished where all parties agreed and the federal interest dictated that a prompt final decision was critical?

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves the Social Security Act, 42 U.S.C. 602(a)(1) and (23).

This case also involves 28 U.S.C. §§ 2281, 1343(3) and (4) and 42 U.S.C. § 1983.

Finally this case involves New York Social Services Law Section 131-a, L. 1969, ch. 84, as amended.

These statutes are set forth in the petition for a writ of certiorari to the Court of Appeals for the Second Circuit filed herewith.

Statement of the Case

The Statement of the Case is set forth in the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit filed herewith.

The Questions Are Substantial

Jurisdiction should be noted because substantial questions are raised by the dissolution of the three-judge court and dismissal of the constitutional claim and because in the posture of this case only this Court can afford full appellate review of federal court jurisdiction over the pendent and dispositive federal statutory claim.

Whether 28 U.S.C. §2281 required a three-judge court to hear both the constitutional and federal statutory claim was explored in depth at the outset of the suit along with the jurisdictional base of 42 U.S.C. §1983 and 28 U.S.C. § 1343, as applied in *King* v. *Smith,* 392 U.S. 309 (1968). Judge Weinstein ruled that Appellants presented a substantial constitutional attack on a statute of statewide applicability which under § 2281 must be heard by a three-judge panel and that federal courts assuredly have jurisdiction over this constitutional claim under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, however narrowly construed, without regard to amount in controversy. *King* v. *Smith, supra; Shapiro* v. *Thompson,* —— U.S. —— (1969). The same

provisions provided jurisdiction for the Social Security Act claim, which was plainly pendant to the constitutional attack on the same state law, *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *King* v. *Smith, supra.* Judge Weinstein further ruled that in accordance with the traditional rule the pendant claim should also be heard by the three-judge court particularly since "a three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case, so that uncertainty may be eliminated as soon as possible" (7a).

Chief Judge Lumbard designated a panel to hear the case and all of the jurisdictional and substantive issues were briefed and submitted to the three-judge panel. That court affirmed *per curiam* that this was a case required to be heard by the three judges in its express holding under 28 U.S.C. §2281 that "a three-judge court was properly convened in this case" (10a), but thereupon dismissed *sua sponte* the constitutional claim as now moot and unripe (12a). Because the constitutional claim was supposedly moot or unripe, the three-judge court declined to decide the federal statutory claim and remanded the case to the initial single district judge for appropriate proceedings.

This dismissal is obviously improper. A constitutional challenge is not unripe where a self-executing statute dictates an unconstitutional result and simply provides discretionary administrative power to avoid that result. That was precisely the situation which exisited in *Damico* v. *California,* 389 U.S. 416 (1967), *McNeese* v. *Board of Education,* 373 U.S. 668, and *King* v. *Smith, supra,* where there was administrative authority to right the wrong complained of. Indeed it is the situation existing in every

case in which an administrative rule or regulation, which the administrator has the power to change, is attacked on constitutional grounds. See, *King* v. *Smith,* 390 U.S. 309 (1968), *Columbia Broadcasting System* v. *United States,* 316 U.S. 407 (1947). Whether based on ripeness or mootness, this ruling in essence required exaustion on an action properly brought under §1983, as the court itself seemed to recognize in suggesting mandamus in the state courts (12a).

Ordinarily a three-judge court would not unnecessarily decide a constitutional claim where there is a dispositive statutory claim before it. *Siler* v. *Louisville & Nashville Ry. Co.,* 213 U.S. 174 (1909); *King* v. *Smith, supra; Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960). Nor would it, having heard full argument on the entire case ordinarily remand a pendant statutory claim to the single judge, *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Brotherhood of Locomotive Engineers* v. *Chi., R.I. & Pac. Ry. Co.,* 382 U.S. 423 (1966); *Florida Lime & Avocado Growers* v. *Jacobsen, supra,* though there is some authority for remand of a non-constitutional claim to the initial single district judge, *Hobson* v. *Hansen,* 256 F. Supp. 18 (1966); *Chester* v. *Kinnomon,* 276 F. Supp. 717 (D. Md. 1967); *Londry* v. *Daley,* 288 F. Supp. 194 (N.D. Ill. 1968) (three-judge court, returning issues to single judge).

However that may be, the erroneous dismissal of the constitutional claim and the bifurcation of the case at this late stage had a fundamental distorting effect on the Second Circuit's review of the central question of whether pendant jurisdiction was properly retained over the Social

Security Act claim after remand.* The Court of Appeals recognized that it could not review the validity of the judgment and underlying findings of the three-judge court, since only this Court has jurisdiction to hear an appeal under 28 U.S.C. §1253 from the judgment of a three-judge court in a case actually required to be heard by such a court under 28 U.S.C. §2281. This was such a case before dismissal of the constitutional claim. Compare *Moody* v. *Flowers*, 387 U.S. 97 (1967) and *Idlewild Bon Voyage Liquor* v. *Epstein*, 370 U.S. 713 (1962), with *Stratton* v. *St. Louis S. W. Ry.*, 282 U.S. 10 (1930) and *Snell* v. *Wyman, supra.* In adhering to these limits on review, the Court of Appeals deemed a determinative claim to be whether pendant jurisdiction was extinguished when the three-judge court dismissed the constitutional claim and declined itself to reach the Social Security Act claim. Indeed, it was suggested that this was implied in the three-judge court's decision to dissolve itself and that this dissolution rendered *King* v. *Smith*, otherwise plainly controlling, inapplicable. This determination, a likely basis for the determinative stay order of the Second Circuit, arises in the context of an appeal in which petitioners cannot even argue the invalidity of any ruling of the three-judge court, including the plainly erroneous predicate that the constitutional claim was itself moot or unripe for lack of exhaustion.

---

* Upon the dissolution of the three-judge court, Appellants did not immediately seek highly fragmented review in this Court for obvious reasons. First, the factors compelling the exercise of pendant jurisdiction whether by one judge or three were overwhelming. It seemed inconceivable that either Judge Weinstein or the Second Circuit would permit New York to lower subsistence grants in the face of the federal command, where jurisdictional bases were both clear and established.

Even though the respondents had vigorously sought a three-judge court, they did not dissent from the dissolution of that court.

We recognize the quagmires and multiple confusions stemming from the provisions for one and three-judge courts and the consequent different (and often uncertain) paths to appellate review. But we know of no instance where this structure can lead to the fundamentally unfair result of truncated appellate review predicated on plainly erroneous legal findings, themselves unreviewable. Jurisdictional whipsaw or error compounded may thus be used to avoid *King* v. *Smith* and to avoid adjudication on the merits of a substantial claim on which the rudiments of daily life for 850,000 persons and a profound national interest in federal law and order depend. This is surely not a passive virtue, though it borders on judicial abnegation. In this posture, there is no court in our federal system but this one which can meaningfully perform the function of appellate review over this case.

Even within the limitations on the appellate power of the Second Circuit, the finding that pendant jurisdiction ceased over a federal cause of action upon dismissal of the constitutional claim after submission of all claims for final judgment is profoundly at odds with controlling authority. As *United Mine Workers* v. *Gibbs, supra,* makes clear, the exercise of pendant jurisdiction before or after resolution of the jurisdiction conferring claim is discretionary. Considered in light of the extraordinary commitment of judicial resources, the voluminous materials and extensive record before the Court, the position of the parties seeking a highly-expedited decision and the wholly federal character of the pendant federal cause of action, there is not the slightest doubt that District Judge Weinstein did not abuse his discretion in resolving the 402(a)(23) claim several days after dissolution of the three-judge court. The federal interest itself compelled prompt adjudication.

CONCLUSION

For the reasons stated above, the decision below is both substantial in impact and erroneous, and jurisdiction should be noted.

Respectfully submitted,

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June, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. _____

Nos. 1539 & 1540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners-Appellants,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX TO PETITION FOR CERTIORARI, MOTION TO EXPEDITE AND JURISDICTIONAL STATEMENT

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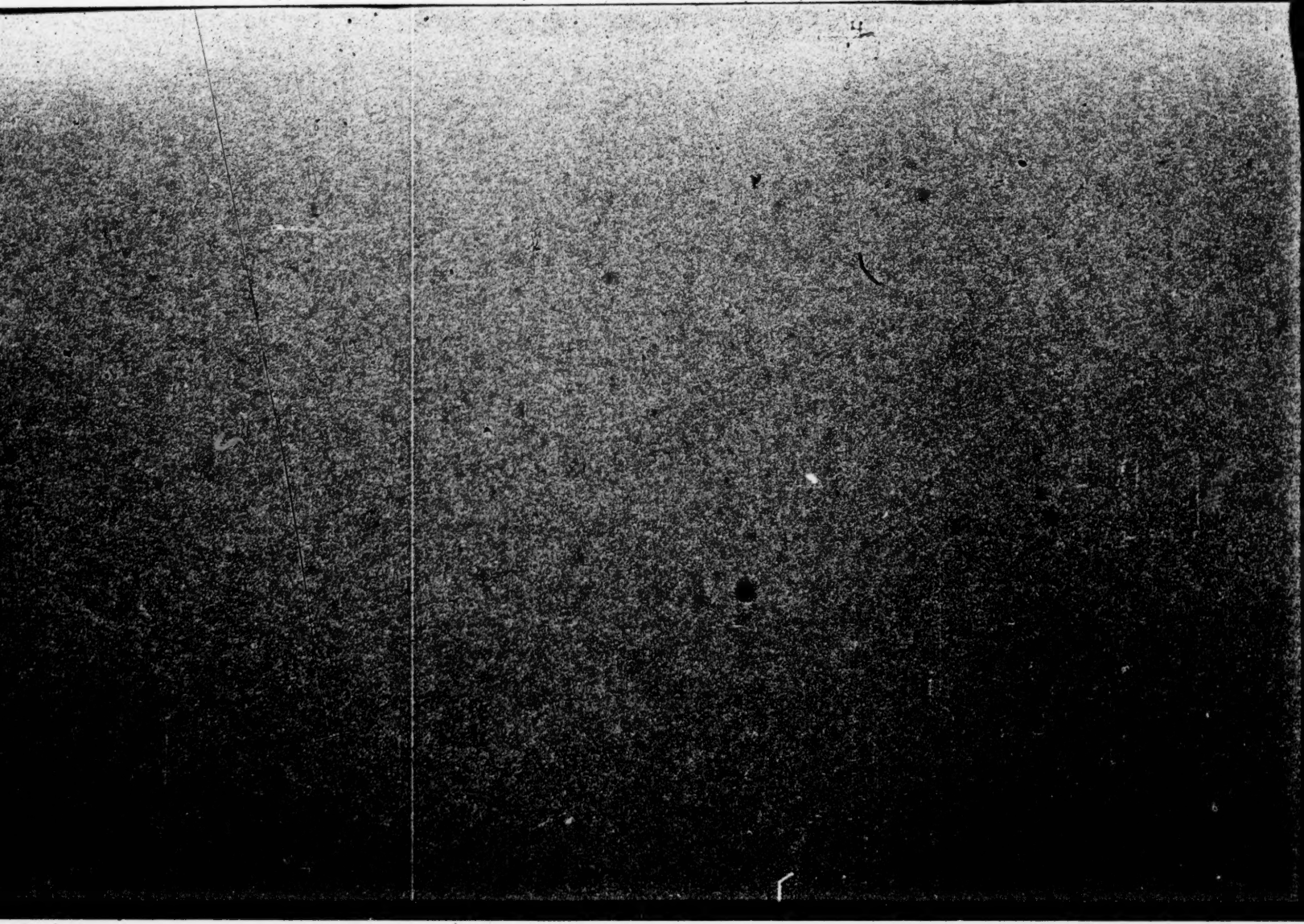

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APPENDIX A

Memorandum and Order of Hon. Jack B. Weinstein, District Judge, dated April 23, 1969 Denying Defendants' Motion to Join HEW as a Necessary Party Defendant

This is a class action brought by ten recipients of welfare assistance under the Aid to Families With Dependent Children Program (AFDC) to declare invalid and enjoin the implementation of the recently enacted amendment to New York's Social Services Law which allegedly cuts substantially the level of welfare payments throughout the state as of July 1, 1969. N. Y. Soc. Serv. § 131-a added by Laws Ch. 184, March 31, 1969. The defendants have moved pursuant to Rule 19 of the Federal Rules of Civil Procedure to join the Department of Health, Education and Welfare (H.E.W.) as a necessary and indispensable party. For the reasons stated below, the motion is denied.

A necessary party is defined by Rule 19(a) as:

> A person . . . (1) in [whose] . . . absence complete relief cannot be accorded among those already parties, or (2) [who] . . . claim[s] an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring doubt, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

H.E.W. does not fall within clause (1) of Rule 19(a). This Court would not "be obliged to grant partial or 'hollow'

rather than complete relief to the parties before" it in the absence of H.E.W. Advisory Committee Notes to Rule 19. Plaintiffs are seeking to invalidate section 131-a so that the present welfare law will remain in effect; they do not seek to cut-off federal funds. Such a remedy is an appropriate one and can be granted in the absence of H.E.W. *See, e.g., King* v. *Smith,* 392 U.S. 309 (1968); *Westberry* v. *Fisher,* 37 U.S.L.Week 2573 (D. Me. 1969); *Williams* v. *Danridge,* —— F. Supp. —— (D. Md. 1969); *cf.* Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 117 (1967). H.E.W. has not been a party in the recent challenges to state welfare laws. *See, e.g., Shapiro* v. *Thompson,* —— U.S. ——, 37 U.S.L.Week 4333 (1969); *King* v. *Smith,* 392 U.S. 309 (1968); *Westberry* v. *Fisher,* 37 U.S.L.Week 2573 (D. Me. 1969); *Williams* v. *Danridge,* —— F. Supp. —— (D. Md. 1969). Although a state has the option of withdrawing from the AFDC program, it cannot be said to have exercised the option by the passage of a statute inconsistent with federal law in the absence of an express statement of withdrawal by the state legislature. *See, e.g., King* v. *Smith,* 392 U.S. 309 (1968).

To require plaintiffs to proceed against H.E.W. would put them in the untenable position of being forced to seek a cut-off of all welfare payments in order to challenge a law on the ground that it provides for inadequate payments. Such a rule would only serve to insulate state welfare laws from judicial review by deterring potential plaintiffs from challenging them in the courts.

H.E.W. does not fall within clause (2) of Rule 19(a). While it does have an arguable interest in the subject matter of this litigation since it is required to review each state plan to determine whether the plan complies with

federal standards, H.E.W.'s absence will not, "as a practical matter," impair its ability to protect that interest or expose any of the existing parties to double or inconsistent liability.

H.E.W. has strenuously opposed the motion to join it as a party. Its interests can be adequately protected, and its position made known to the Court, by the filing of an amicus brief. *See Lampton* v. *Bonin,* Civ. No. 68-2092, Sec. E (E.D. La., complaint filed November 14, 1968) (H.E.W. requested to file amicus brief); *Jefferson* v. *Hackney,* CA-3012-B (N.D. Tex., complaint filed February 12, 1969) (same). Any negotiations H.E.W. is currently conducting with New York State can continue while this action is progressing.

Defendants' motion to join H.E.W. as a necessary and indispensable party is denied.

So ordered.

Dated: Brooklyn, New York
April 23, 1969

JACK B. WEINSTEIN
U.S.D.J.

APPENDIX B

Memorandum and Order of Hon. Jack B. Weinstein, District Judge, dated April 24, 1969 Convening a Three-Judge Court and Issuing a Temporary Restraining Order

This is a class action to declare invalid section 131-a of the New York Social Services Law, effective July 1st of this year, fixing maximum benefits for certain classes of welfare recipients in the state. Plaintiffs, residents of Nassau County and the City of New York who are presently receiving welfare benefits which will be substantially reduced under the new law, have moved for a temporary restraining order. Defendants have moved for the convening of a three-judge court. For the reasons stated below, both motions are granted.

Plaintiffs allege that the New York statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Social Security Act of 1935, as amended, and the regulations of the United States Department of Health, Education and Welfare, conditioning receipt of federal aid and its use by the states in their welfare programs. In brief, it is the contention of plaintiffs that federal law requires New York State, if it is to participate in the federal welfare reimbursement program, to take into account increases in the cost of living in computing new benefit levels; that the new state statute violates federal standards by arbitrarily decreasing the sums permitted to be paid to welfare recipients and by arbitrarily discriminating against Nassau County residents in reducing their payments substantially below those available to New York City residents without any basis in cost-

of-living differentials; and that the new state law, if it becomes operative, will cause severe and irreparable harm to plaintiffs and their infant charges.

At this preliminary stage of the litigation it is important to note that plaintiffs are not contending that federal law or regulations require the states to provide any welfare benefits. The power of the legislature to determine how the state's resources should be allocated through the levying of taxes and the appropriations of state monies is not being challenged. Rather, it is plaintiffs' position that when a state chooses to participate in the federal welfare program and receives federal appropriations, it must comply with valid federal conditions.

We first address ourselves to the question of a three-judge court. The way the issues have been framed by the parties, they can be broken down into two questions: first, whether a three-judge court is required to hear plaintiffs' equal protection claim and, second, if a three-judge court would be required, whether it should be convened now or whether a single judge should first decide the statutory cost-of-living claim.

A three-judge court is necessary to hear plaintiffs' equal protection argument. It is clear that it raises a substantial federal question. The Supreme Court's opinion in *Shapiro* v. *Thompson,* —— U.S. ——, 37 U.S.L.W. 4333 (1969), decided this past Monday, establishes that the Equal Protection Clause has wide application in the welfare area and suggests that the purpose of conserving funds may not, in and of itself, support grossly dissimilar treatment between similarly situated individuals.

Plaintiffs allege that the classification of New York City residents separate and apart from non-City residents—particularly those in Nassau County—is an invidious dis-

crimination. It is contended that the distinction is not based on need since the cost-of-living for welfare recipients in Nassau County is equal to, or higher than, that in New York City. Under the present law Nassau County is grouped with New York City in determining the schedule of payments. Under the proposed law it is grouped with counties outside the City; as a result, welfare payments will be substantially lower than those for New York City residents. The differences are, it is argued, so far out-of-line with cost-of-living differences between the City and County as to constitute an irrational, invidious and unconstitutional discrimination. We cannot, on the record before us, say that this claim is frivolous.

The two arguments that plaintiffs present against convening a three-judge court on this issue are not persuasive. The fact that they are seeking a declaratory judgment rather than injunctive relief, in the circumstances of this case, is merely a semantical, not a practical, difference. A declaratory judgment would have an effect identical to an injunction. In their complaint plaintiffs ask for "such other relief" as is appropriate and the Court will have the power to grant an injunction. That one may be required is suggested by the fact that plaintiffs are now seeking a temporary restraining order.

The contention of plaintiffs that, so far as Nassau residents are concerned, a statewide statute is not under attack, is without merit. Challenged is the state's entire plan for setting levels of welfare payments. Plaintiffs' attack, if fully successful, may have an effect on welfare recipients in every county in the state.

The second question is whether this Court should refrain from convening a three-judge court until it decides the

statutory cost-of-living issue. Plaintiffs' argument that this is a separate and independent claim and that the statutory issue should be decided first, in an attempt to avoid reaching the constitutional issue, is normally persuasive. In this case, however, all parties agree that time is of the essence. Were the Court to decide the statutory claim first and decide it against plaintiffs, a three-judge court would then need to be convened. The delay would be costly to all concerned.

A three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible. A direct appeal to the Supreme Court would lie from a three-judge determination. That Court can move quite expeditiously in matters of this sort, particularly with regard to a stay. Should it subsequently be determined that a three-judge court was not required, the single judge's decision, as part of that three-judge court, would become the opinion of the Court.

We turn now to the question of whether a temporary restraining order should be granted pending the convening of a three-judge court.

Extensive briefing, argument, affidavits of the individual plaintiffs, and experts' testimony in Court requires a finding at this preliminary stage of the litigation that plaintiffs have a substantial probability of establishing the validity of their claims and the right to the remedies they seek, both provisionally and permanently. These findings, it should be emphasized, are not findings on the merits of the action.

Both sides have indicated that prejudice will result should section 131-a be declared invalid after administra-

tive action has been taken which would prevent the state from keeping the present system in effect on July 1st. Plaintiffs' testimony supports a provisional finding that the new statute will cause welfare recipients to lose funds required to keep them at the level of bare subsistence. The state's witness testified that, on the one hand, many recipients will receive higher payments under the new system and, should the state commence payments under section 131-a, the state will not be able to obtain reimbursement if the section is struck down. On the other hand, he stated, it will reimburse those whose payments were illegally reduced.

The sums involved are large. It is estimated that payments under the new system will be approximately $10,000,000. a month less than under the old. And in some cases reductions to welfare recipients run in the order of 20%. Thus, both the state and many welfare recipients may be irreparably harmed if payments made under the new statute are ultimately determined to be illegal.

Witnesses for both sides indicated that it would take between six to eight weeks to change from one system to the other. The state's testimony indicated that it was possible to prepare for the new system under section 131-a while being able to remain in a position to continue the present system should that be required. This could be done, state experts believe, by preserving the present electronic data processing tapes (or by making a copy of them), while making new tapes in planning for the new system. Since the plaintiffs' witness indicated that the City intends to proceed by modifying the present tapes, it is important that the state take steps for their preservation.

Accordingly, the Court is signing and filing a temporary restraining order today and is writing to the Chief Judge of this Circuit notifying him of this determination that a three-judge court ought to be convened pursuant to section 2284 of title 28 of the United States Code. The Court is striking from the plaintiffs' proposed order references to announcements to welfare recipients. The Court can rely upon the good sense of all welfare officials to try to minimize the anxiety of welfare clients.

The twenty day period to answer expires on April 29, 1969. Because of the necessity for speed, this time will not be extended. Defendants and plaintiffs are advised to have their papers seeking summary judgment and all other relief served and filed on April 29, 1969. The parties are granted until May 2, 1969 to submit reply papers and briefs. All undecided motions will be referred to the three-judge court.

So ordered.

Dated: Brooklyn, New York
April 24, 1969

JACK B. WEINSTEIN
U.S.D.J.

APPENDIX C

Memorandum and Order of Three-Judge District Court dated May 12, 1969 Dissolving Itself

PER CURIAM

A three-judge court was properly convened in this case when plaintiffs challenged the constitutionality of section 131-a of the New York Social Services Law. Chapter 184 of the Laws of 1969, adopted March 31, 1969, effective July 1, 1969. It is contended by plaintiffs that the provision constitutes an irrational and invidious discrimination against residents of Nassau County because the schedules of payments under the Aid to Dependent Children provisions were some 15% less for Nassau County residents than for residents of the City of New York even though the cost of living for those families receiving aid to dependent children was not lower in Nassau County than in New York City.

Following designation of members of the three-judge court by the Chief Judge of this Circuit, all parties filed motions for summary judgment with supporting affidavits on April 30, 1969. On the same day that motions for summary judgment were submitted, a bill to repeal subdivision 4 of section 131-a of the New York Social Services Law and to provide a new subdivision 4 was introduced in the Legislature.

Subdivision 4 of section 131-a, as originally adopted, provided for a method of reduction of monthly grants and allowances in areas outside the City of New York but not for their increase. The new subdivision 4 provides that

the Commissioner of Social Services of the State of New York may promulgate schedules of monthly grants and allowances in individual districts "for greater or lesser amounts" than those established under section 131-a to reflect costs of living "but not to exceed the maximums prescribed" for residents of the City of New York. In addition, the new subdivision 4 also permits local social services officials, "with the approval of the appropriate local legislative body," to "make application to the department" of Social Services "for the promulgation of a schedule pursuant" to this new subdivision. The new subdivision reads as follows:

> 4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

This bill was adopted on May 2, 1969 by the Legislature after a message of necessity from the Governor eliminated

the need for following legislative procedures which might delay its passage. See New York State Constitution, Art. 3 § 14. The Governor signed the bill on May 9, 1969 and, according to its terms, it takes effect on July 1, 1969, as did the original subdivision 4.

Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding. We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. *Cf. King* v. *Smith,* 392 U.S. 309, 312, n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

It is ordered that the three-judge court heretofore convened be and is dissolved and that the matter be and is remanded to the single judge to whom the complaint was

originally presented for such further proceedings as are appropriate. *See Peterson* v. *Clark*, 285 F. Supp. 698, 700 (N.D. Calif. 1968); *cf. International Ladies' G. W. U.* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938).

So ordered.

Dated: Brooklyn, New York
May 12, 1969

/s/ LEONARD P. MOORE
Leonard P. Moore, *Judge,*
United States Court of Appeals

/s/ JACOB MISHLER
Jacob Mishler, *Judge,*
United States District Court,
Eastern District of New York

/s/ JACK B. WEINSTEIN
Jack B. Weinstein, *Judge,*
United States District Court,
Eastern District of New York

APPENDIX D

Opinion in Support of the Issuance of a Preliminary Injunction of Hon. Jack B. Weinstein, District Judge, Dated May 15, 1969

Plaintiffs allege that section 131-a of the New York Social Services Law, effective July 1st of this year (ch. 184, L. 1969) is void because it conflicts with section 402(a)(23) of the Social Security Act of 1935, as amended in 1968, providing Federal Aid to Families with Dependent Children (AFDC). *See* 42 U.S.C. §§ 601, 602; 45 C.F.R. § 233.20 (a)(2)(i); 34 Fed. Reg. 1394 (1966). Their contention is that section 402(a)(23) requires New York State, if it is to participate in the relevant federal welfare reimbursement program, to take into account increases in the cost of living in computing new benefit levels; that the new state statute violates federal standards by decreasing the sums to be paid to many welfare recipients and that the new state law, if it becomes operative, will cause severe and irreparable harm to plaintiffs and their infant charges.

Both plaintiffs and defendants have moved for summary judgment. In addition, plaintiffs have moved for a preliminary injunction to enjoin the defendants from instituting changes pursuant to section 131-a until this litigation can be decided on the merits.

The test for granting summary judgment is whether there exists "any 'genuine issue as to any material fact.' F. R. Civ. P. 56(c); see, F. R. Civ. P. 56(e)." *Waldron* v. *Cities Service Co.*, 361 F. 2d 671, 672 (2d Cir. 1966), *aff'd sub nom. First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). The test for granting a preliminary injunction is whether plaintiffs have made "a

clear showing of probable success and probable irreparable injury." *Clairol Incorporated* v. *Gillette Company,* 389 F. 2d 264, 265 (2d Cir. 1968). See F. R. Civ. P. 65.

For the reasons stated below, it is clear that plaintiffs have a substantial claim with a high likelihood of prevailing on the merits and that they will probably suffer irreparable damage unless a preliminary injunction is granted. Accordingly, such an injunction will issue.

There are still a number of unresolved questions of fact; the statistical and other data underlying this dispute have not yet been developed with clarity sufficient to warrant granting summary judgment. Pursuant to Rule 56(f) of the Rules of Civil Procedure this Court orders "a continuance to permit affidavits to be obtained or depositions to be had" or testimony and exhibits to be presented.

Because of the importance of this matter we assume that defendants will wish to take an immediate interlocutory appeal pursuant to section 1292(a)(1) of title 28 of the United States Code from the order granting the preliminary injunction. In order to render as much assistance as possible to the Court of Appeals and to the parties, should an appeal be taken, we have set out below the posture of the case in more detail than is ordinarily warranted in disposing of preliminary applications. It should be emphasized that the conclusions are tentative only, are made only for the purpose of deciding the motions before us, and do not determine the merits of the case.

I. Jurisdiction

Plaintiff's complaint challenges section 131-a on two main grounds: first, denial of equal protection of the laws because residents of Nassau County are discriminated against by payment schedules substantially below those for the City of New York; and, second, conflict with a federal

statute. A three-judge court was required to be convened because plaintiffs' equal protection claim raised a substantial federal constitutional question with respect to the applicability of a state-wide statute. 28 U.S.C. § 2281. *See, e.g., King* v. *Smith,* 392 U.S. 309, 312, n. 3 (1968); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960); *Kramer* v. *Union Free School Dist. No. 15,* 379 F. 2d 491 (2d Cir. 1967). *See also Shapiro* v. *Thompson,* —— U.S. —— (1969); *Westberry* v. *Fisher,* —— F. Supp. ——, 37 U.S.L.W. 2573 (D. Me. 1969); *Williams* v. *Dandridge,* —— F. Supp. —— (D. Md. 1969); *Lampton* v. *Bonin,* —— F. Supp. —— (E.D. La. 1969).

After the three-judge court was convened the legislature adopted an amendment to section 131-a which rendered the equal protection claim moot. Accordingly, the Court dissolved itself and remanded the case "to the single judge to whom the complaint was originally presented for such further proceedings as are appropriate." *Rosado* v. *Wyman,* —— F. Supp. —— (E.D.N.Y. 1969).

At the outset we must confront the question of our jurisdiction to decide the federal statutory claim. *Cf. King* v. *Smith,* 392 U.S. 309, 312, n. 3 (1968). There are a number of independent bases for concluding that jurisdiction exists.

A. *Pendent Jurisdiction*

Once its jurisdiction has been properly invoked, a federal district court acquires pendent jurisdiction to decide all related claims, including those involving federal and state statutory questions, arising out of the same transaction or dispute. *See, e.g., United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Hurn* v. *Oursler,* 289 U.S. 238 (1933); *Gulickson* v. *Forest,* 290 F. Supp. 457, 464 (E.D. N.Y. 1968). The district court has power to decide the pendent claim even if it does not reach the issue which provided the basis for the court's jurisdiction or even if it first

decides the jurisdiction-founding issue against the plaintiffs. *See, e.g., King* v. *Smith,* 392 U.S. 309 (1968); *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Siler* v. *Louisville & Nashville R. Co.,* 213 U.S. 175 (1909); *Gulickson* v. *Forest,* 290 F. Supp. 457, 464 (E.D.N.Y. 1968).

In the present case, it is clear that at the time the three-judge court was convened jurisdiction existed pursuant to section 1343(3) of title 28 and sections 1983 and 1988 of title 28 of the United States Code. These provisions grant original jurisdiction to the federal district courts, without respect to the amount in controversy, over cases where it is claimed that a right under the United States Constitution is being violated. The three-judge court, in its *per curiam* opinion, noted that it had been "properly convened" (*Rosado* v. *Wyman,* —— F. Supp. ——, —— (E.D.N.Y. 1969)), thereby impliedly ruling that a substantial federal question had been raised. *See, e.g., Swift & Co.* v. *Wickham,* 382 U.S. 111, 115 (1965) ("no such court [three-judge court] is called for when the alleged constitutional claim is insubstantial"); *Kramer* v. *Union Free School Dist. No. 15,* 379 F. 2d 491 (2d Cir. 1967). There is no doubt that under the liberal test recently enunciated by the Supreme Court in *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), the cause of action based on the Social Security Act would be considered pendent to the equal protection claim.

The question posed is whether this Court has been divested of pendent jurisdiction because the federal constitutional claim was rendered moot after the three-judge court convened and heard argument on motions by all parties for summary judgment. This question must be answered in the negative.

Once pendent jurisdiction attaches, a federal court has the power to decide the entire case. Where the claim which

provided the basis for its jurisdiction has been disposed of prior to trial, however, courts have in the exercise of discretion, tended to voluntarily abstain from deciding pendent questions. *See United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"); *Wham-O Mfg. Co.* v. *Paradise Mfg. Co.,* 327 F. 2d 748, 752-54 (9th Cir. 1964); *Strachman* v. *Palmer,* 177 F. 2d 427, 431 (1st Cir. 1949) (concurring opinion); Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1025 (1967); *cf. Clairol Incorporated* v. *Gillette Company,* 389 F. 2d 264, 267-268 (2d Cir. 1969) (jurisdiction over unfair competition claim despite concession of lack of valid trademark registration); *Rogers* v. *Valentine,* 37 F.R.D. 231 (S.D.N.Y. 1964) (after summary judgment granted on federal claim, jurisdiction retained over pendent non-federal claim).

The rationale for this doctrine of restraint in the exercise of pendent jurisdiction is that a federal court should seek to avoid "[n]eedless decisions of state law":

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *United Mine Workers* v. *Gibbs,* 363 U.S. 715, 726 (1966).

See also Wham-O-Mfg. Co. v. *Paradise Mfg. Co.,* 327 F. 2d 748, 753 (9th Cir. 1964); *Strachman* v. *Palmer,* 177 F. 2d 427, 431, 433 (1st Cir. 1949) (concurring opinion). Accordingly, applying what has been referred to as "the introduction of evidence test," some federal courts "hold that when a federal claim is dismissed *on the pleadings,* the

court should not retain a related nonfederal claim absent an independent basis for federal jurisdiction." Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1025 (1962) (emphasis in original).

Application of this rule would be entirely inappropriate, wasteful of judicial energy and dangerous to the litigants in a case such as the one before us. The pendent claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designed to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.

We do not mean to suggest that the New York State courts would be more likely to fall into error or to show hostility toward federal law than would a federal court. We are only now deciding whether it is appropriate for a federal court to divest itself of jurisdiction of a pending case.

Factors to be taken into account in deciding this question include "judicial economy, convenience, and fairness to litigants.", *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). These criteria provide justification for the doctrine of pendent jurisdiction generally; they compel retention of jurisdiction in the instant case.

A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the testimony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. Resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date—July 1, 1969.

Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

Having found that pendent jurisdiction exists, we need not reach the question whether administrative remedies must be exhausted in a suit challenging a state AFDC provision solely on statutory grounds. *See King* v. *Smith,* 392 U.S. 309, 312 n. 4 (1968); *Rosado* v. *Wyman,* —— F. Supp. —— (E.D.N.Y. 1969) (HEW not necessary party); *cf.* Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967) (inadequacy of federal administrative forum).

B. *Federal Question Jurisdiction*

Jurisdiction also rests on section 1331 of title 28 of the United States Code. This section grants the district courts jurisdiction over all civil actions arising under "the Con-

stitution, laws, or treaties of the United States" provided that "the matter in controversy exceeds the sum or value of $10,000."

There is no doubt that the first requirement is met since plaintiffs allege that the challenged state statute violates section 402(a)(23) of the Social Security Act. Defendants contend, however, that the controversy does not involve more than $10,000.

The test for determining the amount in controversy relies heavily upon plaintiffs' good faith and the certification of lawyers pursuant to Rule 11 of the Federal Rules of Civil Procedure that there is "ground to support" the pleadings. It has been described by the Supreme Court as follows:

> The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288 (1938).

See also Horten v. *Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1960). Where, as here, the plaintiffs in apparent good faith allege that more than $10,000 is in controversy, courts are most reluctant to sustain a challenge to jurisdiction. *See* Wright, Federal Courts 94-95 (1963).

In determining whether this test has been satisfied in a class action of this kind, the claims of the individual plaintiffs or individual members of the class may not be aggregated. *Snyder* v. *Harris*, —— U.S. ——, 37 U.S.L.W. 4262 (1969). *Compare* 1 Moore, Federal Practice ¶ 0.91[1] at p. 827 (2d ed. 1964) *with* Wright, Federal Courts 100

(1963). Nevertheless, for purposes of jurisdiction in this case, each family may be considered as a unit and the claims of each member of a single AFDC family can be combined because the federal statutory program relied upon by plaintiffs is designed to protect the family as a unit.

If we only look to the impending reductions in welfare payments that any family in the class may suffer, the monetary loss to each of the plaintiffs does not approach $10,000. Yearly welfare payments may not be multiplied by a number of years in the future to make up the $10,000 requirement because it is too speculative to assume that any particular plaintiff will remain on welfare or that the program will remain unchanged.

While the direct damage to each member of the class does not suffice, the indirect damage to each plaintiff and his charges may be very high. There is before this Court uncontradicted evidence, by testimony and affidavits, that members of the class are at or below a bare subsistence level. Under such circumstances, a reduction in welfare benefits putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits. *Cf. Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954) (psychological damage resulting from improper schooling). Deprivations during early years may irreversibly retard mental and physical development and have an adverse impact on personality.

Without intimating that the position of these plaintiffs is at all comparable, the possibility of a serious injury resulting from a comparatively minor deprivation may be more clearly seen if we look at the situation of a Biafran child. A few cents a day is enough to prevent starvation or permanent maiming of such a child; several dollars a year might mean the difference between a healthy life and

a stunted life or death. Certainly, to such a child, the question whether $10 in foodstuffs should be granted or withheld over a period of a year involves the monetary value of a human life.

We need not go outside the record in this case to consider general literature and Congressional hearings on the grave and permanent harm, particularly to the children involved, that might result from a reduction in welfare payments. Typical of the material before this Court are some of the affidavits quoted below.

A Professor of Pediatrics and Attending Physician in a ghetto hospital with "a great many patients who are recipients" of public assistance swears that many of them "have marginal nutritional status;" that "a decrease in the amount of assistance which these individuals receive for the purchase of food would create a deficiency in their diets and could lead to clinical malnutrition;" that "malnutrition tends to retard the physical and mental growth" of children and "may greatly diminish the ability of the individual to learn;" that this deficiency "will remain with the individual for life;" that children born of "undernourished mothers" have a substantially increased tendency to premature birth with "greater incidence of infant mortality and an increased likelihood of mental and neurological damage;" and that elimination of special diets and other assistance by reductions such as those proposed by the statute in question will cause damage "to individual recipients . . . so great as to be incalculable."

A Senior Social Worker at a Medical Center swears that "at existing welfare levels most welfare recipients live in a state of constant anxiety, depression, frustration, and physical suffering due to the inadequacy of their welfare grants" and as a result of the proposed reductions the "suffering which will result . . . will cause irreparable, and incalculable, harm."

A Certified Social Worker with 28 years experience, employed by the Community Service Society of New York, Inc., swears that as a result of the reductions, "Serious unattended health problems will multiply and proliferate, children's ability to achieve in school will be even further depleted, diets will be at a starvation level as families try to stretch their grossly inadequate budgets to meet their most basic needs . . . ;" and that "Family life, already strained, will be . . . severely jeopardized."

The Chief of Budget Standard Service of the Community Council of Greater New York swears that "deprivation [from the new proposed standard] will result in incalculable hardship and misery to the already severely deprived families in our community."

A Dean of a School of Social Work swears that the proposed reduction will cause "great harm to the physical, mental, emotional and moral health of these families."

A Professor at a medical college and Director of a Neighborhood Health Center swears that "any diminution in income [of the families involved in this litigation] will worsen an already intolerable situation, resulting in irreparable damage."

A Retired Medical Director of the United States Public Health Service serving as Deputy Director of Obstetrics and Gynecology at a ghetto hospital and Professor at a college of medicine swears that "the possible harm afflicted upon pregnant mothers and newborn children is incalculable."

In view of the relatively trivial injuries which result in recovery of more than $10,000 in this Court, it cannot be said that under no view of the facts is the amount in controversy less than $10,000 as to any member of the class. We do not, of course, in considering this jurisdictional

matter, pass upon, or express any view with respect to, the accuracy of the affidavits quoted.

C. *Jurisdiction Under 28 U.S.C. § 1343(3)*

Plaintiffs also invoke section 1343(3) of title 28 of the United States Code as a basis for jurisdiction. This provision grants the district courts original jurisdiction of any civil action, irrespective of the amount in controversy, to "redress the deprivation under color of any State law . . . , of any right privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens." Plaintiffs assert that this section, when read with section 1983 of title 42, grants federal courts jurisdiction over controversies involving substantial individual rights protected by federal welfare statutes. Because jurisdiction to decide the statutory claim of invalidity is clearly founded both on section 1331 of title 28 and upon pendent jurisdiction arising from section 1343(3) of title 28, we need not and do not address ourselves to this position. *Cf. King* v. *Smith,* 392 U.S. 309, 312, n. 3 (1968). *Compare* Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, Clearinghouse Review, February-March, 1969 at p. 5; Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 112-14 (1967) *with* Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1291-93 (1953).

II. General Nature of Federal-State Program for Aid to Families With Dependent Children

New York, together with every other state, participates in the AFDC program established by the Social Security

Act of 1935. Section 401 of the Act provides that the federal government shall make "payments to States which have submitted, and had approved by" the federal government "State plans for aid and services" to "needy children and the parents or relatives with whom they are living." These federal payments are made on a matching fund basis. Administration of the program is entirely in the hands of the states, although each state's plan must meet the several requirements of the Social Security Act and the rules and regulations promulgated by the United States Department of Health, Education and Welfare (HEW). 42 U.S.C. § 602. *See King* v. *Smith*, 392 U.S. 309 (1968).

Each state participating in AFDC must formulate, in monetary amounts, a standard of need and provide a level of benefits based upon this standard. 45 C.F.R. § 233.20 (a)(2)(i), 34 Fed. Reg. 1394 (1969). Theoretically, the standard of need is computed by adding the cost of all of the items deemed to be necessary for subsistence. Those whose incomes are below the standard of need have a budgetary deficit consisting of the difference between their income and the standard of need and they are eligible for welfare assistance.

A state is free to determine the items, and their costs, to be included in its standard of need. In practice, it may not include all the necessary items or the prices used may not reflect true cost. That this is often the case is evidenced by affidavits and supporting memoranda submitted to the Court establishing that welfare budgets based on standard of need tend to be below the level which most studies indicate is necessary for normal daily functioning and healthy family life.

Were a state paying 100% of its standard of need, the amount of the welfare grant to a recipient with no income

would be equal to the standard of need. But, some states' level of benefits are not determined solely by their own standard of need. Some states impose a flat maximum on the amount of the benefit—*i.e.*, no family can receive a welfare grant of more than a stated number of dollars, an amount which varies according to the size of the family —even if this sum does not fully cover the budgetary deficit indicated by its own computation. Other states apparently pay only a fixed percentage of need—*e.g.*, if the standard of need were $100 per month, the state would pay 80% of need and a person without other income would thus receive only $80 per month.

Since "each State is free to set its own standard of need and to determine the level of benefits" (*King* v. *Smith*, 392 U.S. 309, 318-19 (1968)), the sums paid by different states to comparable families under the AFDC program vary considerably. Thus, 29 states pay 100% of what they define as standard of need, while Mississippi pays only 27% of its standard of need. The average monthly AFDC payment per recipient ranges from a high of $71.75 in New York to a low of $8.50 in Mississippi, as of June, 1968.

III. New York's Current Program

Up to now New York's levels of benefits have purportedly been designed to fully make up budgetary deficits as defined by its standard of need. The New York Department of Social Services is authorized to establish grant levels "in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities." N.Y. Soc. Serv. § 131(3). Pursuant to section 131 of the New York Social Services Law, the Regulations of the Department of Social Services establish the "budgetary method" of computing the stand-

ard of need and levels of payments. 18 N.Y.C.R.R. § 353.1. "[A]ll items of basic maintenance and all items of special need required by [individual] case circumstances" comprise the recipient's "estimate of regularly recurring need" and are to be included in the welfare budget. 18 N.Y.C.R.R. § 353.1(d). The "recurring cash grant [is] . . . the full budget deficit,"—that is, the excess of "the estimate of regularly recurring need" over the recipient's "available resources" 18 N.Y.C.R.R. §§ 353.1(a), (d); 353.3(a). The test by which it is determined which persons or families are eligible for welfare benefits, is defined as follows:

> An individual or family shall be deemed "in need" when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs required by the case circumstances and included in the standards of assistance. 18 N.Y.C.R.R. § 353.1(c).

New York welfare allowances have consisted of two separate types of grants. First, the basic, recurring grant to cover food, clothing, household supplies, school expenses, and other items of basic subsistence, exclusive of rent and fuel for heating which are added to the allowance of the recipient on a separate basis. The amount of this grant varies with the size of the family and the age of the oldest child (18 N.Y.C.R.R. § 352.4(a), (b)) because older children, particularly growing teenagers, require more in the way of food and clothing.

Payments are presently made according to three schedules promulgated by the State Commissioner of Welfare. One of them, set out below, covers the area of New York City and nearby counties where most persons receiving aid reside.

SCHEDULE SA-1

NEW YORK CITY AND COUNTIES OF: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.
Monthly

	One Person	*Two Persons*	*Three Persons*	*Four Persons*	*Five Persons*	*Six Persons*	*Seven Persons*	*Eight Persons*	*Nine Persons*	*Ten Persons*
Oldest child 5 years of age or under		94	*125	*152	*180	*204	*234	*262	*293	*320
Oldest child 6 or 7		107	*138	*165	*192	*216	*246	*275	*304	*332
Oldest child 8 or 9		107	152	*178	*205	*228	*259	*288	*317	*344
Oldest child 10 or 11		107	152	191	*218	*240	*271	*300	*329	*356
Oldest child 12 or 13		118	162	201	240	*262	*292	*321	*351	*378
Oldest child 14 or 15		118	173	211	250	283	*314	*343	*372	*400
Oldest child 16 or 17		118	173	221	259	293	335	*364	*394	*421
Oldest child 18 or 19		118	173	221	269	302	345	386	*415	*443
Oldest child 20 or 21		118	173	221	269	312	354	395	437	*464
Adults	66	110	156	198	238	274				

*** When there is more than one adult in households with an asterisk, add $16 for each additional adult.**

For a pregnant woman in any size household, add $5.50.

For an AABD recipient living alone, add $8. [Aid to Aged] Blind and Disabled.]

For each AABD recipient in a family group, add $5.

For each additional person over 10 in the household, add $32.

Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a minor child and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an adult.

The other two schedules, covering upstate areas, are similar in form but somewhat lower in amounts.

In May of each year, the Department of Social Services has conducted a cost-of-living survey. It has adjusted the standard of need as reflected in changing price levels as of August of the same year. Since prices have been rising for some time, the yearly adjustment has required increases in the standard of need. Schedules presently in effect are based on a May, 1968 cost-of-living survey. They were issued on August 23, 1968 and each local Department of Social Services was required to implement them within nine months of August 1, 1968.

As supplements to the basic grant shown in Schedule SA-1, above, New York provides what it calls "special needs" grants. Special needs grants are designed to cover expenses for extraordinary or non-recurring items such as major items of clothing and furniture and household supplies (18 N.Y.C.R.R. §§ 352.4(c), 352.5(j)), medically-dictated special diets (18 N.Y.C.R.R. § 352.4(b)(7), (8), (9)), moving expenses (18 N.Y.C.R.R. § 352.5(m)), and expenses incident to education (18 N.Y.C.R.R. § 352.5(d)). *See also* 18 N.Y.C.R.R. §§ 352.4(c)(iv) (layette); 352.4(b)(6)(i) (restaurant allowance for persons unable to prepare meals at home); 18 N.Y.C.R.R. 352.5(b), (c) (expenses incident to employment and securing employment); 352.5(g) (child care services); 352.5(h) (laundry services); 352.5(i) (telephone service when such service is incident to the production of income, health, or safety); 352.5(p) (transportation expenses to secure medical care or other essential verified transportation needs). These grants are required because it is recognized that the basic schedules

provide no surplus from which additional needs can be met.

Pursuant to a "demonstration project" instituted on August 27, 1968, New York welfare recipients in the City of New York were given a flat cyclical grant of $100 per year; a family of four, for example, would receive $400 per year. This flat grant was designed to replace many—but not all—of the special needs grants and to eliminate the necessity of the welfare recipient applying for many small individual items as they were needed.

Affidavits, studies and testimony before the Court agree that the present schedules, as supplemented by cyclical grants and special grants, are not in excess of present minimum requirements for life at the lowest acceptable level in New York. As the Commissioner of the Nassau County Department of Social Services put it, speaking of the pre-section 131-a situation, "the present standards of assistance provide for life on a level of sustenance, nothing more, and often less." Or, as the Deputy Commissioner in the State Department of Social Services testified, AFDC recipients "of necessity have learned to squeeze every penny."

IV. New York's New Program

Section 131-a is intended to substantially alter the welfare system in New York State beginning in July, 1969. In place of the present administratively drawn schedules based on annually determined costs of living, the size of the family and the age of the oldest child, it substitutes a system of flat grants set by the legislature and varying solely with the size of the family. All special grants, including the $100 flat cyclical grant for New York City residents, are abolished (except for the special grant for the replace-

ment of clothing and furniture destroyed by flood or fire). Two separate schedules of payments are created, one solely for New York City and the other for the rest of the state. (The schedule for the rest of the state may be modified administratively so long as it does not exceed the schedule for the City of New York. *See Rosado* v. *Wyman*, —— F. Supp. —— (E.D.N.Y. 1969) (three-judge court)).

The new schedules were computed by using the average payments to a family of four as the base and then adding or subtracting fixed amounts for additional or lesser numbers of children in families of different sizes. Set out below is the statutory schedule of maximum grants to residents in the City of New York:

Number of Persons in Household

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$70	$116	$162	$208	$254	$297	$340

> For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

To these sums is added the cost of rent and fuel. A lower schedule is provided for areas outside the City. These schedules, the statute declares, "shall be deemed to make adequate provision for all items of need."

The state's brief describes "the method of establishing the levels set forth in the schedules contained in the statute" as follows:

> The mean age of the oldest child in each size family was ascertained. The mean age rather than the median was used as this produced a more generous result in most cases. The amount of allowance provided in 1968

> for a family of each size in cases where the oldest child was of the mean age was then adopted as the allowance for that size family. Where the mean age contained a fraction, the older age was used, again working a benefit to the recipient. Thus, for a family of four, which received amounts ranging from $152.00 to $221.00 (depending upon the age of its oldest child), the mean age of such oldest child was found to be 10.09 and, therefore, $191.00, the figure where the oldest child was ten or eleven, was used as a base amount. To this was added $17.00—the amount necessary to bring the allowance up to $35.35, the subsistence level determined by the United States Government for New York City for a family of four, or a monthly allowance of $208.00. The allowance for the remainder of the state was determined at a differential of $25.00 for a family of four. As the computations of the Department show, these levels, based on the previous allowance including the cost of living increases of 1968, will result in slightly increased benefits to families with younger children and slightly decreased benefits to those with older children. Memorandum of Law in Support of Defendants' Motion for Summary Judgment, pp. 9-10.

It is not yet clear how such a statistically even-handed technique resulted in even steps of either $43 or $46 as the size of the family increased.

Special grants were seemingly not included in these computations. No attempt was made to average them out across the state and then to add that figure to that of the basic recurring grant.

Each of the individual plaintiffs in this action will suffer substantial cuts ranging up to 20% in their welfare payments as a result of section 131-a. Set out below is a table listing the individual plaintiffs, the number of dependents of each plaintiff, the monthly grant exclusive of rent each is currently receiving, and the maximum that each will receive.

Plaintiff	*Size of Family and Age of Oldest Child*	*Current Grant*	*Maximum Under 131-a*
Rosado	5 people, oldest child 14	$280	$254
Hernandez	3 people, oldest child 16	$218	$162
Miley	10 people, oldest child 15	$535	$469
Abrom	7 people, oldest child 13	$406	$340
Gathers	7 people, oldest child 19	$382	$340
Lowman	8 people, oldest child 14	$396	$383
King	9 people, oldest child 17	$482	$426
Folk	4 people, oldest child 16	$337	$208
Phillips	5 people, oldest child 14	$314.40	$224
Duffy	10 people, oldest child 20	$563.40	$389

(Plaintiffs Phillips and Duffy are residents of Nassau County. If they resided in New York City, or if the Commissioner of Social Services increases their maximums as much as the statute permits, their respective maximums under section 131-a would be $254 and $469.)

As a result of the abolition of special grants, plaintiff Abrom will not receive the following grants now supplied to her: $15 a month for large sized clothing for her children; $15 a month for medically required special diets; and $5.80 a month for the laundry of diapers. Plaintiff Miley will not be able to receive the following special grants now supplied: $155 a month for a homemaker and

$9 a month for a telephone, both required for medical reasons; and $80 a month for special diets for herself and her family.

While a large percentage of families, particularly those living outside the New York City metropolitan area with young children and with little need for special grants, will receive more under the new system than they do at present, a substantial majority of the AFDC families in the state will have their payments reduced on July 1, 1969. It is not clear how much the reductions will amount to inside and outside the city and by size of family.

Most beneficiaries of the AFDC program live in New York City (657,000 out of a state total of 887,000 was the 1968 monthly average). Under subpoena, and based upon statistics supplied by a State Department of Social Services study of July, 1968 and 1969-70 caseload projections, the Acting Deputy Director of the Bureau of Fiscal Administration of Social Services of the City of New York has made the following computations of the effect of section 131-a in that City:

> The total benefits lost to clients will be $39,142,768. 63.5% of the cases will lose while 36.2% gain. The average annual loss per case will be 343.81 while the average gain is 145.55.

These computations have been controverted by defendants' testimony indicating that 41.5% of AFDC cases would receive increases, 58.1% would receive decreases and .04% would be unchanged.

Apparently the plaintiffs' computations include special and cyclical grants. They do not indicate the effect of the changes outside the City of New York. The effect of upstate residents seems to be less severe; approximately

51% suffer cuts, while 49% are afforded increases. Any possible gain to upstate residents, who comprise only a small percentage of AFDC recipients, probably does not offset the reductions to City residents of total amount of aid paid. It is not clear whether this result would be changed if counties outside New York City took advantage of the opportunity afforded by the amendment to section 131-a discussed in the *per curiam* opinion of the three-judge court, *Rosado* v. *Wyman,* —— F. Supp. —— (E.D. N.Y. 1969), and raised their schedules of payments to New York City levels.

Computations of loss by the parties apparently do not include allowance for a cost-of-living adjustment which has heretofore been made administratively each year in May. Under section 131-a no cost-of-living adjustment will be made in 1969 even though it is undisputed that the New York City Consumer Price Index has risen at an average rate of 0.5% per month in the last two years and that the rate of increase has accelerated since February of this year.

V. Reasons for New York's New Program

In the state's view it "was not the case" that section 131-a resulted in a "reduction of standards;" rather, it contends, section 131-a was intended to, and did, maintain the standard of need while providing administrative streamlining. Reply Memorandum for Defendants, pp. 7-8. Its brief declares:

> the adoption of § 131-a was the fruit of continuous legislative and departmental study of the problem of maintaining a standard of need during a period of sharply increasing numbers of recipients, especially in the ADC program. To avoid a reduction, administrative streamlining and elimination of individual de-

terminations of eligibility for a plethora of special grants was regarded as essential. *Ibid.*

The advantages of a system of flat grants to the recipient are, the state contends,—and the plaintiffs do not dispute this—substantial:

> the flat grant concept, regarded as the most enlightened and progressive method of public assistance payment, eliminating the necessity of the welfare recipient applying for individual items—often a degrading and time-consuming process—and thereby enhancing his dignity, increasing his ability to budget and self-respect, and freeing case workers from bookkeeping decisions in order to allow them to devote their time to counseling of recipients. Memorandum of Law In Support of Defendants' Motion for Summary Judgment, p. 8.

There is considerable doubt about the defendants' suggestion that the new schedules were designed wholly, or even primarily, to meet the demands of efficiency. The proposal to convert to a flat grant system was initiated by the New York State Board of Social Welfare. In its report to the Governor in May, 1968 it recommended flat grants "based on family size and the age of the oldest child" to "include food, clothing, personal incidentals, household supplies, school expenses" and the like, with "additional money amounts" in certain circumstances such as special diets or moving expenses, which are not common to all recipients." Challenge and Response, 4 (May 1968).

This proposed change was not designed to reduce standards of need or payments. In a letter of Commissioner Wyman to the Governor's Counsel dated September 13,

1968, the flat grant system was spelled out in great detail as Proposal 20, an outline of a proposed bill to provide establishment of standards of assistance. The schedules included were those in present section 131, not the reduced schedules in section 131-a. Moreover, many special grants such as those for special clothing and for diet supplements for pregnant women and medical patients were provided. And there was a provision for annual repricing of schedules "whenever the repricing shows an increase or decrease of 2% or more." This proposal was never introduced in bill form.

The Governor's Budget, dated January 21, 1969, did not indicate any plan for a shift in methods of computing standards of need. *See* Executive Budget for the Fiscal Year April 1, 1969 to March 31, 1970, 566-67, 571-72, 778-780. AFDC payments were expected to continue "to increase principally because of the increasing cost of living and a continued demand for public assistance recipients for the granting of special need items in addition to the basic subsistence allowances." *Id.* at 779. The percentage of federal aid was expected to decline because of a "freeze" on the number of children to be aided and restricted participation in cases of aid due to unemployment of a parent. *Ibid.* Based upon monthly AFDC averages, the projected number of recipients for 1968-69 was 917,235 and for 1969-70 it was 1,095,704. The average budgeted monthly grant was $74.57 for 1968-69 and $83.37 for 1969-70. *Id.* at 779. The total 1969-70 AFDC program cost was projected at $1,096,172,000; $440,195,000 was anticipated in federal aid. *Id.* at 778. The estimated cost-of-living increase for 1969-70, based upon the system then in force was $5,000,000 and this sum was apparently included in the $1,096,172,000 figure. Since the share of the state and of local social service

districts is almost equal (*id.* at 778), $321,125,000 was budgeted for 1969-70 as the state's share of the 1969-70 AFDC program. The total Local Assistance Fund for State Aid Programs for the Department of Social Services was budgeted at $1,040,514,000. *Id.* at 786. *See also* Sen. 1689, Ass. 2305 (1969).

Because, the Governor reported, "necessary expenditures are expected to outstrip available funds," he suggested "a reduction in the level of recommended budget expenditures by approximately 5 per cent across-the-board." Executive Budget for the Fiscal Year April 1, 1969 to March 31, 1970, M7. The Local Assistance Fund, including AFDC contributions by the state, was to be "limited to 95 per cent of the amount of expenditures otherwise estimated . . . to keep expenditures within available income." *Id.* at 739. This would have redueed the category of state aid to AFDC by approximately $16,000,000 and all programs of state social service local aid would have been reduced by $52,000,000 to $988,000,000.

It is not clear from the Governor's proposals whether the total AFDC program cost was intended to be reduced 5% from $1,096,172,000, for a cut of approximately $55,000,000, or whether the local social service districts were expected to increase their share leaving the total program cost unchanged. In any event, no one suggested that the 5% cut was anything but a money saving device.

During the legislative session the Governor's proposed budget was modified to provide greater aid than the Governor had requested for some items but to reduce state Aid to Dependent Children even further. The budget bills do not show the detailed amounts for each category of local aid but show a lump sum for all categorical assistance. Instead of $988,000,000 proposed by the Governor—after

the 5% cut—$913,000,000 was appropriated. Sen. 1689-A, Ass. 2305-A (adopted March 29, 1969, ch. 49, L. 1969). This constituted a reduction of approximately 12% from the original projected cost. We are informed that departmental computations indicate that $297,441,000 was the amount intended for the AFDC program, a saving of $23,684,000 or about 7% over the Governor's Budget. When the $5,000,000 amount in the Governor's Budget for 1969 cost-of-living increases is eliminated the reduction is $18,684,000, or about 6%. Since the state's share is some 34%, the decrease in total AFDC payments under the program seems to have been at least some $50,000,000.

A further reduction of $42,000,000 was made by the supplemental budget, making the total reduction in local aid for categorical assistance some 16% from what the Governor's Budget had estimated as projected costs. Sen. 5692, Ass. 7205 (adopted May 2, 1969, ch. 340, L. 1969). We are told by the state that if this sum is not supplied by the federal government "the 1970 Legislature would be requested to cover the amount in a supplementary budget."

Defendants have indicated, in a letter to the Court dated May 14, 1969, that the $42,000,000 cut in the Supplemental Budget was taken "from the $297,441,000 figure" for local AFDC aid. This would mean a total cut of $65,441,000 from the Governor's original cost estimate of $321,125,000 for this item. Such a reduction of 20% in AFDC payments is so great as to suggest that it represents technical budgetary adjustments rather than reductions in payments to recipients. The same letter just referred to states:

> the budget bureau, which has been working at a breakneck speed at the end of the legislative session, has not been able to fully retrieve and prepare the tables on this amount to indicate whether the difference of $23,-

684,000 over the proposed budget, represents administrative savings or partial savings from the abolition of special grants and to what extent it contemplates an expanded purchase of services program.

Some further explanation seems called for of how and why the budgets affecting AFDC were reduced.

Timing of legislative action shows the close relation between the new AFDC program and budgetary decisions. Section 131-a was not introduced until February 18, 1969 in the Assembly (Ass. 6620) and March 27, 1969 in the Senate (Sen. 5419), some time after the Governor's Budget Message was delivered on January 21, 1969. The amendment was adopted on March 29, 1969, the same day as the budget. There is good reason to believe, when the budget is read with section 131-a, that a cut in the projected cost of the total AFDC program as well as in the state contribution was intended.

Since a reduction of payments, based on projections, was likely to be required to achieve these budgetary reductions, since all affidavits and testimony indicate that payments have not been above the standard of need, and since New York continues to purport to pay at 100% of standard of need under section 131-a, there is strong support for the contention that standards of need were reduced.

Motive and purpose of the legislature may be considered in determining what it in fact did. *Cf. Williams* v. *Dandridge,* —— F. Supp. —— (D. Md. 1969) (maximum grant regulation motivated by "an inadequate State appropriation"). The method by which this reduced appropriation was to be divided among recipients under section 131-a may well have permitted a more efficient administrative system. But there is clearly substantial support for the plaintiffs'

contention that section 131-a worked a reduction of standard of payment.

Defendants argue that the elimination of the cyclical grant and the special grants are not to be considered in determining whether the standard of payment has been reduced since they "were over and above New York's payment of 100% of its standard of need" and, thus, "totally gratuitous on the part of the State." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 25. This argument is difficult to credit. The testimony of witnesses for the plaintiffs and the witness for the defendant agree that New York does not pay more than is required for bare subsistence. Special grants are not luxuries; they are merely a different method for meeting family and individual need for bare necessities. In fact, New York's definition of the standard of need prior to adoption of section 131-a included items covered by special grants:

> An individual or family shall be deemed "in need" when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs required by the case circumstances and included in the standards of assistance. 18 N.Y.C.R.R. § 353.1(c).

See also 18 N.Y.C.R.R. § 353.1(d) ("all items of basic maintenance and all items of special need required by case circumstances" comprise the recipient's "estimate of regularly recurring need").

Defendants suggested on argument that the State Commissioner of Welfare was considering the adoption of providing for some of the special grants "on a purchase of service basis." To date we have not been favored with a copy

of any such regulations. It is not clear from the argument that such regulations will, if adopted, cover cyclical or special grants to the same extent as they were covered prior to adoption of section 131-a.

This Court is not, of course, concerned with justifications for state budgetary decisions, nor does it sit to discourage desirable improvement in the efficiency of state welfare programs. The issue before us is whether the system of reducing standards of need and levels of payment embodied in section 131-a violates federal statutes. We turn now to the relevant federal provision for an answer to that question.

VI. Federal Limitations on Reductions in Aid to Dependent Children

A. *Purpose*

Paragraph 23 of subdivision (a) of section 402 of the Social Security Act of 1935, as amended (42 U.S.C. § 602 (a)(23), requires that each state's AFDC plan must:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

This provision was effective January 2, 1968. Pub. L. 90-248, Title II, § 202(b); 81 Stat. 821.

Defendants contend that 402(a)(23) should be narrowly construed. They interpret it as being primarily aimed at raising a state's standard of need and as not controlling a state's level of benefits to AFDC recipients.

In support of this construction of the statute, defendants rely upon the position of HEW as expressed in its amicus brief filed in *Lampton* v. *Bonin*, —— F. Supp. —— (E.D. La. 1969) and the implementing regulation of HEW which would permit a state to make downward adjustments in the amount of AFDC payments through the device of "ratable reductions"—*i.e.*, percentage reductions applied to the standard of need. 45 C.F.R. § 233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969). We disagree and hold that a broader construction of 402(a)(23) is required by language, statutory history and good sense.

Section 402(a)(23) plainly states that both the "amounts used by the State to determine the needs of individuals"—*i.e.*, the standard of need—and "any maximums that the State imposes on the amount of aid paid to families"—*i.e.*, the level of benefits—be adjusted "to reflect fully changes in living costs since such amounts were established." The adjustment contemplated by 402(a)(23) is undoubtedly an upward one in view of the inflationary trend this country has experienced over the last two decades. The one judge who has heretofore considered this question at length has reached a similar conclusion. *Lampton* v. *Bonin*, —— F. Supp. ——, —— (E.D. La. 1969) (dissent, setting out legislative history at length; the majority did not reach the question) ("Congress' intention to compel the states to raise ADC payments"). *See also Dandridge* v. *Williams*, —— F. Supp. ——, —— (D. Md. 1969) ("designed to increase benefits to keep pace with living costs").

This federal provision grew out of an attempt to reform the inequitable and unsatisfactory aspects of our present welfare system resulting from the inadequate and widely varying level of grants among the states. The solution first proposed by HEW would have required all states to meet

in full their own need standards and to adjust payments annually so as to maintain payments at the 100% level despite intervening inflationary price rises. Congress put off enacting any basic change to allow further study and consideration of alternatives. At the same time, it did take an interim step, a holding action against further deterioration in levels of benefit.

Section 402(a)(23) embodies that interim and temporary solution. It creates a floor under present levels of benefit by prohibiting future cuts in welfare payments and by requiring that all states provide at least one increase by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

As already noted, section 402(a)(23) grew out of an Administration proposal to require all states to pay 100% of need and to make annual cost-of-living adjustments beginning July 1, 1969. This proposal was originally embodied in the bill introduced in the House in 1967 at the request of the Administration to amend the Social Security Act. Section 202 of H.R. 5710, 90th Cong., 1st Sess. The bill ultimately reported out by the House Ways and Means Committee and passed by the House, H.R. 12080, contained no such provision.

The Administration renewed its request in the hearings before the Senate Finance Committee and proposed the following amendment to the House Bill:

> [each state plan must] provide (A) effective July 1, 1969, for meeting . . . all the need, as determined in accordance with standards applicable under the plan for determining need, of individuals eligible to receive aid to families with dependent children . . . and (B), effective July 1, 1969, for an annual review of such

> standards and . . . for updating such standards to take into account changes in living costs. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 635.

See also *Id.* at 716 (statement of HEW on its proposed amendments to H.R. 12080).

Secretary of Health, Education and Welfare John W. Gardner, in his testimony before the Committee in support of this amendment, specifically referred to the need to increase the level of benefits:

> The House bill does nothing to improve the level of State public assistance payments. As things stand today, the States are required to set assistance standards for needy persons in order to determine eligibility —but they need not make their assistance payments on the basis of these standards. The result is that welfare payments are much too low in a good many states. . . .
>
> We strongly urge you to adopt the administration's proposal requiring States to meet need in full as they determine it in their own State assistance standards, and to update these standards periodically to keep pace with changes in the cost of living. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 216.

Similar testimony was given by Undersecretary Wilbur Cohen:

> It is this serious discrepancy between what the States themselves determine to be minimal need and the amounts they will actually pay that has led us to strongly recommend that States be required to meet needs in full as they determine them. . . .

But it is not enough only to require the States to meet need standards. They must assure that these standards reflect current prices. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 259.

While Messrs. Gardner and Cohen referred only to state dollar maximums in the illustration used in their testimony (*id.* at 255-260), it was clear from their statements and colloquy with those Senators present that concern was being expressed about any method used by the states to pay less than was indicated by their standard of need. Part of the record reads as follows:

Senator Ribicoff. What happens, Mr. Cohen, with the people who receive payments so far below the standard?

Mr. Cohen. Well, if a State does not pay its full standard, two things can happen. One is, as Senator Long indicated, that they may make up the difference from income from social security or earnings so that they still might meet the standard in those cases where an individual has social security or could work. But, I might say that out of the 2 million people who are old-age assistance recipients, the average age being 75, quite a number of them cannot work, although half of them do have social security benefits.

Senator Ribicoff. I know, but you take all that into account in the standards that are being set. What they are receiving is not just a question of the amount they receive from the welfare agencies. You take into account all they receive. What happens to the child or the adult who receives so much less than what you

consider or is considered a proper standard? How do they live?

Mr. Cohen. They have to live on the lesser amount.

Senator Ribicoff. How do they live?

Mr. Cohen. They have to cut back on their food and clothing and other needs to live on the amount that the State gives them.

Senator Ribicoff. Well, is not a study made or do not you know what happens to these people? I mean just what is happening to them?

Mr. Cohen. Well, I think that the evidence shows—I do not have it immediately before me—that many of these children and these families grow up without adequate food, without adequate medical care, and certainly their whole aspirations for improving their educational status are stunted, and I think that the evidence from the State administrators when you hear them will bear that conclusion out.

Secretary Gardner. It shows up most clearly, I think, in the medical data. You will find a higher incidence of just about every kind of medical disorder and physical handicap in these youngsters—malnutrition and everything else.

Senator Ribicoff. Well, in looking to the cost to society ultimately, the people who are below standard cause a greater drain eventually upon what the society has to pay out in every conceivable way, is that not right?

Secretary Gardner. No question about that, Senator.

Mr. Cohen. I might add, Senator, just to give you a figure which I will come to later, that the average payment per child for the Nation as a whole is around

> $36 per month per child. That is the actual payment, which is a little bit more than $1 per day per child.
>
> Now, I think, that this is an indication of the rather low level and inadequacy of payments that exist in the country as a whole. Some are higher and some are notably and substantially lower. *Id.* at 258-59.

The bill reported out of the Senate Finance Committee, and passed by the Senate, reflected a compromise on this issue. The requirement that all states pay full need was rejected, but the second recommendation—that they be required to annually increase levels of payments to reflect changes in living costs was contained in the Senate version. The bill is practically identical to 402(a)(23) except for a mandated annual cost-of-living adjustment:

> by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid to families will have been proportionately adjusted.

See also Senate Report No. 744, 1967 U. S. Code Cong. & Admin. News 3133.

In the House-Senate Conference Committee, the requirement for annual increases was dropped; only one adjustment prior to July 1, 1969 was to be required. The Conference Committee Report explains:

> The new section [Senate amendment] also amended section 402(a) of the Act to require that by July 1,

> 1969, and annually thereafter, each State . . . must adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums. . . .
>
> Under the [Conference Committee] agreement, the new section 402(a) provision (for adjustments to reflect living costs) would require States to make only one adjustment before July 1, 1969 . . . Conference Committee Report No. 1030, 1967 U. S. Code Cong. & Admin. News 3209.

The language of the basic requirements of 402(a)(23) remained virtually unchanged throughout its legislative evolution. There is no hint from either committee that it intended to change the purpose of the section as expressed by Administration spokesmen. Hence, there is no reason to believe that Congress failed to appreciate the import and plain meaning of the language in 402(a)(23).

B. *Requirements of section 402(a)(23)*

1. *Adjustment of Standard of Need*

Section 402(a)(23) simply requires that all states increase benefits once to keep pace with living costs. The only significant variation in the change required in different states is the percentage adjustment required, which depends on when, prior to January 2, 1968—the date 402(a)(23) became law—a state had last repriced its need standard. The more outdated the prices used to determine need, the greater the required adjustment.

In determining the required adjustment, all items comprising the standard of need must be repriced. While items need not be added, no item previously included and

still required by recipients may be omitted, else the effect of repricing would be nullified. The content of the repriced standard must be equivalent to that of the old. Any consolidation through a combining of items "may not result in a reduction in the content of the standard." 45 C.F.R. § 233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969).

2. *Increase in Level of Benefits*

Section 402(a)(23) by its terms requires every state to increase its level of payments by an amount sufficient to offset the rise in the cost of living. An upward adjustment of "any maximums that the State imposes on the amount of aid paid" automatically necessitates an increment in the amount of such aid.

Defendants contend that this requirement of increased level of benefits does not apply to states such as New York, which have been paying full need or to states which employ percentage reduction systems. "Maximums," according to defendants, is a word of art in welfare law jargon which refers solely to dollar maximums and should be so construed within the meaning of the statute.

This argument is not persuasive. Section 402(a)(23) speaks of "any maximum," not just dollar maximums. If a state pays 100% of need, the standard of need constitutes both the maximum and the amount of aid paid. Repricing the standard of need serves, without more, to increase the level of payments. Both the creation and the reduction of dollar maximums are equal evasions of the statute.

The invalidity of this leg of defendant's argument can be illustrated by a hypothetical. The standards of need in State X and State Y are $200 per month. State X pays full need, or $200, while State Y imposes a dollar maximum of $100. The cost of living has risen 10% in both

states. Under defendants' interpretation of 402(a)(23), State Y would have to increase its monthly payments to $110, while State X could lawfully reduce them to $100, or even $50.

Section 402(a)(23) applies in the same manner to a percentage reduction system. The maximum which must be proportionately adjusted is not, as defendants would have us believe, the number representing the percentage reduction but, rather, the dollar figure resulting from the application of the percentage to a family's need as determined by the State's standard of need.

For example, if a state had a standard of need of $100, and paid 80% of need, the recipient would receive $80. If the need standard were now raised to $120 to reflect a rise in living costs, and the state continued to pay 80%, the recipient would receive $96. The rise in living costs would thus be reflected in increased aid to the recipient.

C. *HEW Implementing Regulation*

"The interpretation . . . by those charged with its administration must be given great weight by courts faced with the task of construing the statute." *Zemel* v. *Rusk,* 381 U.S. 1, 11 (1965). But an administrative interpretation is by no means decisive when it departs from the meaning of the language and purpose of the statute; "deference" is all that is required. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *United States* v. *American Trucking Ass'ns, Inc.,* 330 U.S. 534, 543 (1940); *Hagar Co.* v. *Helvering,* 308 U.S. 389, 394 (1940). *See* cases collected in *Williams* v. *Dandridge,* —— F. Supp. ——, —— (D. Md. 1969) (supplemental opinion). Any HEW regulation or interpretation "inconsistent with the controlling federal statute" may not be relied upon to justify denial of AFDC benefits. *King* v.

Smith, 392 U.S. 309, 333, n. 34, 88 S. Ct. 2128, 2141, n. 34 (1968); *Williams* v. *Dandridge*, —— F. Supp. ——, —— (D. Md. 1969) (supplemental opinion).

HEW agrees that the pricing of the need standard must be updated and that maximums must be appropriately adjusted. If a state has insufficient funds to meet need in full under the adjusted standard, however, HEW would permit it to pay to recipients only a given percentage of the adjusted standard of need. Its regulation states that a state AFDC plan must:

> provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. *In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions* in accordance with subparagraph (3)(viii) of this paragraph [adjustments must be uniform statewide]. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards. 45 C.F.R. § 233.20 (a)(2)(ii), 34 Fed. Reg. 1394 (1969) (emphasis supplied).

Defendants do not contend that section 131-a establishes any ratable percentage reductions of grants applied to the standard of need. "Section 131-a," they insist, "provides for the full standard of need." Memorandum of Law in

Support of Defendants' Motion for Summary Judgment, p. 22. New York thus will continue to purport to pay on the basis of 100% of its standard of need. *Id.* at 23. The validity of the escape route for section 402(a)(23) supplied by the regulation is thus technically not before the Court.

Nevertheless, since this regulation provides the underlying foundation for defendants' position and since the underscored portion of it cannot stand in the face of our interpretation of 402(a)(23), we feel obligated to briefly consider the regulation's validity. Were HEW correct in its assertion that 402(a)(23) can be easily circumvented by a mere technical adjustment of figures and that it does not impair a state's freedom to set any level of payments it chooses—so long as the proper verbiage is used in the state's statutes—we would be reluctant to seriously consider invalidating section 131-a. We are, after all, not playing a legislative word game but dealing with the allocation of tens of millions of dollars in tax receipts and with the well being of a million New York citizens.

Our analysis of the plain meaning of section 402(a)(23) and its legislative history and our construction of "maximums" within the meaning of the statute are equally relevant here and need not be repeated. Only three additional points need be made.

First, it seems an exercise in sophistry to infer, as does HEW, that states are free to do what they will with percentage reductions since 402(a)(23) does not specifically refer to percentage reductions and the percentage figure itself need not be increased. See *Lampton* v. *Bonin*, —— F. Supp. ——, —— (E.D. La. 1969) (dissent); majority did not reach issue). As noted above, the number representing the percentage reduction is not the maximum to

be "proportionately adjusted." Moreover, since the level of payments is automatically adjusted so long as the standard of need is updated and the percentage is kept constant, Congress' failure to mention percentage reductions is easily explainable by the fact that "there simply was no need to in order to achieve the desired results." *Id.* at ——.

Second, to permit ratable reductions in the manner suggested by HEW would nullify the Congressional intent to increase the level of benefits and would render the statute virtually meaningless. A state could avoid increasing payments by merely lowering the percentage figure or, if it had not been a percentage reduction state, by adopting a percentage. Compliance with 402(a)(23) could be secured by a mere administrative adjustment of numbers without effecting any substantive change. States would be able to set any level of payments whatsoever—the identical position they were in prior to the enactment of 402(a)(23). This is highlighted by the very example put forth by HEW to illustrate its position:

> The fact that section 402(a)(23) does not affect percentage reductions *allows States to retain considerable flexibility* as to the amount of their assistance payments. We return to our example where a State with a need standard of $100 paid 80% of need, and the recipients received $80. Because of a 20% rise in living costs, the State's need standard is raised to $120. Such a State could now pay 66⅔% of need, and the recipients would still receive $80. Or the State could pay 100% of need, or 80%, or 50%, according to the available funds. States which formerly paid 100% of need might now change and pay a lesser percentage. States with a system of maximums might in addition

> compute payments on the basis of a percentage of need. HEW Amicus Brief submitted in *Lampton* v. *Bonin*, at page 10 (emphasis supplied).

"Nullification" rather than "flexibility" is a more apt word for such an interpretation.

Finally, were HEW correct, not only will assistance not be increased as Congress intended, but the implementing regulation, by encouraging states to switch to percentage reduction systems, is likely to lead to lower payments to present welfare recipients. The net result, under a percentage reduction system, of raising the standard of need without a concomitant increase in available funds, is to increase the number of persons eligible for relief at the expense of those already on relief. It is inconceivable that Congress intended the most poverty stricken members in our society to pay the added cost of those newly added to the AFDC rolls. In short, we find ourselves in agreement with Judge Cassibry—the only federal judge who has heretofore passed on the regulation—when he wrote that "the HEW interpretation of section 402(a)(23) cannot be accepted for it nullifies the effectiveness of the provision . . . and is invalid." *Lampton* v. *Bonin, supra,* at —— .

We do not decide whether section 402(a)(23) precludes a state from converting to a "flat grant system" by averaging out all the special grants across the state and then adding this figure to that of the basic recurring grant, or by including all items previously covered by special grants as part of the regular grant, or by some other technique. Nor do we now decide whether any flat grant system discriminating against large families or families with older children would be invalid. *But cf. Westberry* v. *Fisher,* ——

F. Supp. ——, —— (D. Me. 1969) (state regulation invalid if "families with a large number of dependent children receive less favorable treatment under Maine's AFDC program than families with a small number of dependent children"). All we need now decide is that section 402(a)(23) precludes a state from making changes resulting in either a reduced standard of need or a maximum on the amount of aid paid. *Cf.* 45 C.F.R. § 233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1968) (consolidation of the standard of need "may not result in a reduction in the content of the standard").

Defendants' suggestion, already adverted to, that it may adopt through administrative regulations a method of replacing special and cyclical grants by a purchase of service method, does not seem to overcome deficiencies under the federal program, or render the case unripe for decision. Section 402(a)(23) is addressed to "the amounts of aid paid" under the AFDC program. Under that program "aid to families with dependent children means *money payments* with respect to . . . a dependent child or dependent children." 42 U.S.C. §606(b) (emphasis supplied). This aid must be adjusted by repricing under the federal act and not by the purchase of services from vendors. Purchase, with direct payment to vendors, does not comply with the federal requirements and with HEW regulations designed to protect the "amounts of aid paid" under the AFDC program. *See* HEW Handbook of Public Assistance, Part IV, Section 5120 *et seq.;* 45 C.F.R. 233.20(a)(ii), 34 F.R. 1392 (1969). A state apparently may not claim federal reimbursement for the provision by vendor payments or purchase of service of "subsistence and other assistance items" normally included in standard of need unless the federal statute and regulations specifically

so provide. *See* 42 U.S.C. § 602(a)(13) and (14); 45 C.F.R. Parts 220 and 226 (34 Fed. Reg. January 28, 1969 and January 25, 1969) (child welfare, family planning and other family services may be purchased; other services must be provided by the agency itself).

The requirement that payments be in cash gives recognition to the right to freedom of choice and to self-respect by the recipient of welfare. Thus, the interpretation of section 406(b) of the Act (42 U.S.C. § 406(b) in the HEW Handbook reads as follows:

> The provision that assistance shall be in the form of money payments is one of several provisions in the act designed to carry out the basic principle that assistance comes to needy persons as a right. The right carries with it the individual's freedom to manage his affairs; to decide what use of his assistance check will best service his interests; and to make his purchases through the normal channels of exchange, enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. The Social Security Administration's interpretation of "money payments" recognizes that a recipient of assistance does not, because he is in need, lose his capacity to select how, when, and whether each of his needs is to be met.

VII. Conclusion

As a participant in the AFDC program, New York may not breach "its federally imposed obligation to furnish 'aid to families with dependent children • • • with reasonable promptness to all eligible individuals • • • .'" *King* v. *Smith*, 392 U.S. 309, 333 (1968). The state's plan "must

conform with several requirements of the Social Security Act." *Id.* at 317. One of the federally imposed conditions —resulting from enactment of section 402(a)(23)—is that participating states not reduce either standards of need or levels of benefit below those in force on January 2, 1968 as revised to reflect cost-of-living increases between that date and July 1, 1969. Any "state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." *Id.* at 333, n. 34; *Solman* v. *Shapiro*, —— F. Supp. —— (D. Conn. 1969); *Westberry* v. *Fisher*, —— F. Supp. —— (D. Me. 1969) (invalidity of maximum budget regulations); *Dews* v. *Henry*, —— F. Supp. —— (D. Ariz. 1969); *Williams* v. *Dandridge*, —— F. Supp. —— (D. Md. 1968).

We do not hold that New York "must appropriate addifional funds to support its participation" in the AFDC program. *Williams* v. *Dandridge*, —— F. Supp. —— (D. Md. 1968). We hold only that if it participates it must comply with federal law.

There is a substantial possibility that section 131-a of the New York Social Services Law does reduce both standards of need and levels of payment in violation of federal law. If this section is declared to be invalid and irreversible steps to implement section 131-a have been taken or changes on actual payments pursuant to section 131-a have been made, irreparable harm to recipients of AFDC will result. On balance, the probability of harm to plaintiffs from a failure to grant a preliminary injunction far outweighs possible harm to the state in granting one. Accordingly, the parties will submit proposed orders for a preliminary injunction by 4:30 P.M. on Friday, May 16, 1969. The attorneys for the parties should be present in chambers at that time so that arrangements for further proceedings can be made.

VIII. Some Questions of Fact

In preparation for the meeting in chambers, attorneys should consider the questions of fact listed below and be prepared to raise any additional issues they desire the Court to consider.

1. What is the total average grant (recurring and special) per family of each size?
   (a) New York City
   (b) New York State outside of New York City
   (c) New York State as a unit
2. What is the average amount that a family of each size receives in special grants?
   (a) New York City
   (b) New York State outside of New York City
   (c) New York State as a unit
3. What is the number of families of each size receiving AFDC assistance?
   (a) New York City
   (b) New York State outside of New York City
   (c) New York State as a unit
4. What is the number of families of each size with an oldest child above the mean for that size family?
   (a) New York City
   (b) New York State outside of New York City
   (c) New York State as a unit

5. The same question as (4) as regards families of each size with a child below the mean age.

6. What is the total number of families receiving increased grants under section 131-a (taking into account cyclical and special grants available under present law)? What is the total dollar amount of the increases? What is the average increase per family (broken down into families of each size)?

   (a) New York City

   (b) New York State outside of New York City

   (c) New York State as a unit

7. The same question as (6) as regards decreases.

8. Is it contemplated that any persons presently eligible as an AFDC recipient will be declared ineligible for such aid under section 131-a?

9. Why do the levels of payments in section 131-a increase by the same amount as the size of the family increases?

10. What is the number of AFDC recipients in each of the counties comprising the present SA-1 schedule other than the five New York City counties?

11. What effect will the new Food Stamp program have on AFDC recipients? Who will be eligible? Will it be applicable throughout New York State? When will this information be available?

12. The same question as (11) as regards the Day Care Center program.

13. What other programs, if any, are to be initiated or expanded to meet AFDC needs? When?

14. What amounts were appropriated in the budget passed March 29, 1969 for each of the forms of categorical aid?

15. What amounts were appropriated in the Supplemental Budget passed May 2, 1969 for each of the forms of categorical aid?

16. How were the figures referred to in questions (14) and (15) determined, *i.e.*, what statistical bases were employed in reaching the final dollar amounts in each of these categories?

17. What is the degree of flexibility available in transferring funds between different categories of aid administered by the Department of Social Services?

18. What were the total dollar amounts appropriated in the 1968-69 fiscal year for AFDC in (a) the Local Assistance Fund Budget adopted in 1968, and (b) all deficiency budgets adopted in the 1968-69 fiscal year?

19. Does the difference of $23,684,000 between the proposed budget and the budget actually adopted as regards the AFDC appropriation represent administrative savings or partial savings from the abolition of special grants? What figures were used to answer this question?

20. What is the explanation for the additional reduction of $42,000,000 in the AFDC appropriation in the Supplemental Budget and how will this reduction affect payments to recipients?

21. Assuming the $42,000,000 was cut from the May 2, 1969 Supplemental Budget in contemplation of increased federal aid: (a) will payments for AFDC continue at the pre-reduction rate foreseen by the March 29, 1969 budget, or will across-the-board reductions of any type be made, and (b) what will be done if these increased federal benefits do not come into being?

22. Is there any legislative history supporting the claim that the $42,000,000 reduction was in contemplation of increased federal benefits and, if so, is there any obligation on the part of the New York Legislature to make up the deficiency if these increased benefits are not enacted?

23. What has been the general practice of the New York Legislature when faced with deficiencies caused by unanticipated federal failures to increase payments in this and other areas?

24. Has there been any further correspondence between the state and HEW regarding the AFDC program?

So ordered.

Dated: Brooklyn, New York
May 15, 1969

JACK B. WEINSTEIN
U.S.D.J.

APPENDIX E

Order of Hon. Jack B. Weinstein, District Judge, dated May 16, 1969

Plaintiffs having moved this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order restraining defendant Wyman from implementing and putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law Section 131-a, added by Laws Ch. 184, March 31, 1969, and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, the testimony taken in open court, and the hearings held to date; and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said Section 131-a, insofar as it effectuates a reduction in the grant levels of public assistance, which require further consideration by this Court, and (2) New York, its subdivisions and recipients of public assistance throughout the State of New York will suffer irreparable injury if the preparations which are made for implementation of said reductions will prevent the continuation of grants at present levels if this Court finds the reductions invalid, it is

ORDERED, ADJUDGED AND DECREED THAT, pending adjudication by this Court of the validity of the reductions in public assistance effectuated by said Section 131-a:

1. Defendant Wyman, his successors in office, agents and employees and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Chil-

dren program under State supervision (insofar as said officials have actual notice of this injunction), are hereby restrained from denying, reducing or discontinuing public assistance benefits pursuant to said Section 131-a. Benefits which may not be denied, reduced or discontinued under this order include both regular recurring grants and special grants now available to public assistance applicants and recipients (including the quarterly "flat grant" in New York City and special needs grants throughout the State). Applications for regular and special grants shall be processed in the ordinary course of business without delay or interruption and shall be granted to all persons eligible under current standards despite any provision to the contrary in said Section 131-a.

2. The defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this injunction) may take steps to prepare for conversion to the reduced grants on July 1, 1969, provided that no such step will prevent continued and uninterrupted payments under the present system or some other valid system if Section 131-a is ultimately found invalid.

It is also ORDERED, ADJUDGED AND DECREED that this Temporary Restraining Order shall expire ten days after entry unless renewed by this Court.

Dated: Brooklyn, New York, May 12, 1969.

JACK B. WEINSTEIN,
U.S.D.J.

APPENDIX F

Order of United States Court of Appeals for the Second Circuit, of June 11, 1969 Staying the Injunction

The Attorney General having moved for stay of the preliminary injunction issued by the district court on May 16, 1969, and due deliberation having been had thereon, it is

ORDERED that the said injunction be and it hereby is stayed pending disposition of the appeal. Opinions of the Court will follow in due course.

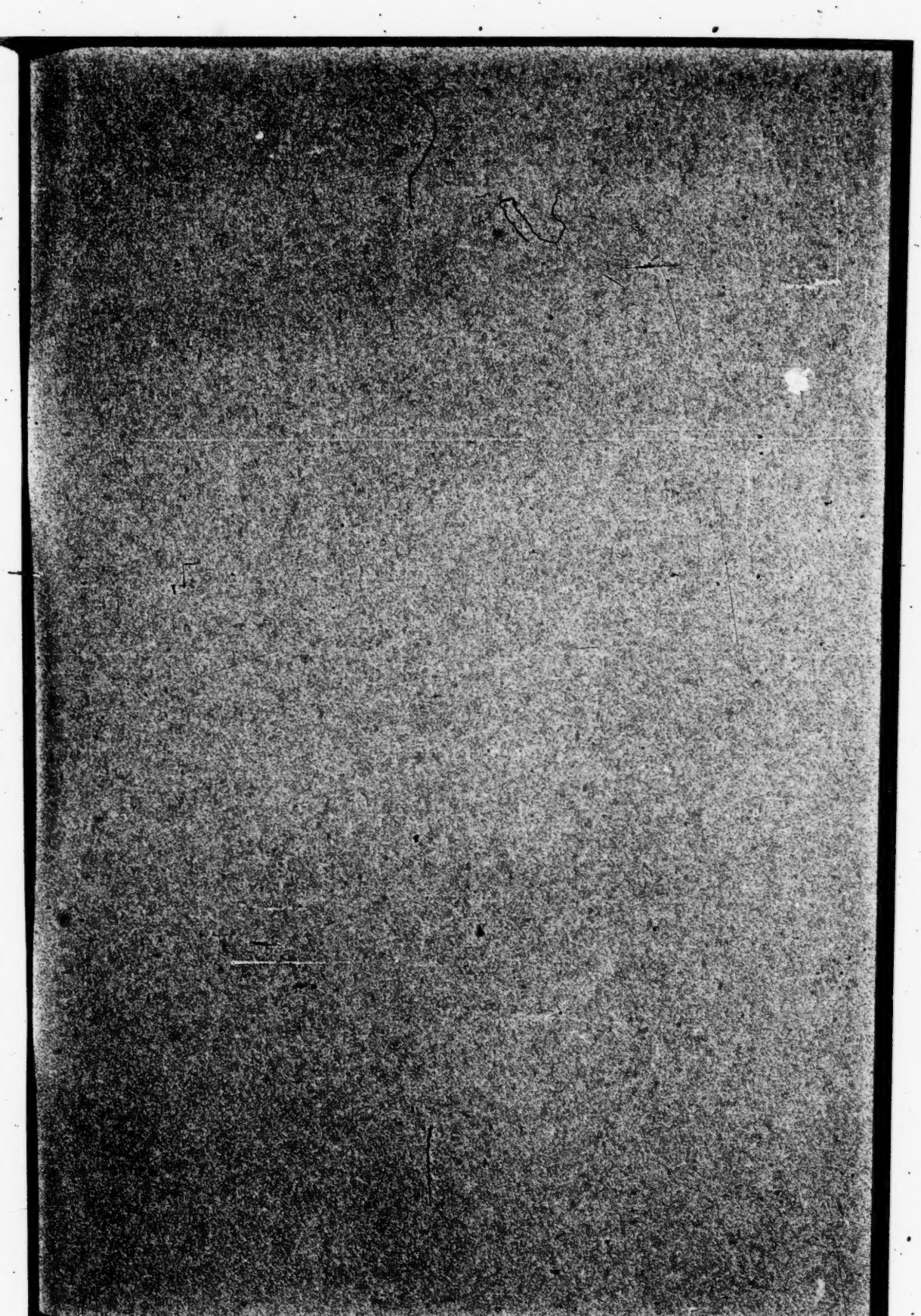
/s/ J. EDWARD LUMBARD

/s/ PAUL R. HAYS

I dissent from the grant of the stay of Judge Weinstein's order.

/s/ WILFRED FEINBERG

June 11, 1969



JUN 19 1969

JUN 23 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1539 1540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Plaintiffs,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Defendants.

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, and BLOCK COMMUNITIES, INC.; CITIZENS COMMITTEE FOR CHILDREN; CITIZENS UNION; COALITION FOR ADEQUATE INCOME AND MEDICAID; INTER-SCHOOL COUNCIL OF THE METROPOLITAN NEW YORK SCHOOLS OF SOCIAL WORK; NATIONAL ASSOCIATION OF SOCIAL WORKERS, NEW YORK CITY CHAPTER; NATIONAL URBAN LEAGUE; NEW YORK ACTION CORPS; PROJECT ON SOCIAL WELFARE LAW OF THE ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM, NEW YORK UNIVERSITY SCHOOL OF LAW; SOCIAL WORK ACTION FOR WELFARE; UNION SETTLEMENT ASSOCIATION; *AMICI CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1968

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Interest of *Amici*

The American Civil Liberties Union, the New York Civil Liberties Union and several other groups respectfully seek leave to file a brief *amici* herein in support of the petition for a writ of certiorari. *Amici* are organizations deeply involved in their daily professional endeavors with the problems of welfare recipients. Each is particularly concerned with the plight of the poor in our society. Each is particularly concerned with the relationship of economic discrimination to human liberty and dignity. These organizations and individuals seek to file a brief because this case affects, with awful and immediate directness, the lives of almost one million poverty stricken residents of New York, including several hundred thousand children.

ARGUMENT

The Reduction in Welfare Payments Mandated by Section 131-a of the New York Social Services Law Raises a Question of Critical National Importance Requiring Prompt Settlement in This Court.

Section 131-a of the New York Social Services Law, scheduled to go into effect on July 1, 1969, mandates a decrease of up to 20% in welfare payments to the approximately one million persons receiving Federal Aid to Families with Dependent Children (AFDC) in New York State.

The Federal District Court for the Eastern District of New York granted an injunction against the implementation of the reduction in the AFDC payments on the ground that Section 131-a is void because it is in conflict with Sec-

tion 402(a)(23) of the Social Security Act of 1935. The Court of Appeals for the Second Circuit has stayed the District Court's preliminary injunction, pending its own decision on the merits of the respondents' appeal therefrom. The District Court's permanent injunction rendered on June 18, 1969, has been temporarily stayed, pending action by the Court of Appeals for the Second Circuit. Accordingly, the implementation of Section 131-a is proceeding on schedule and will go into effect on July 1, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) authorizing this Court to grant a writ of certiorari upon the petition of a party prior to the rendition of judgment by the Court of Appeals. This Court has provided in Rule 20 that a:

> "writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court."

We respectfully submit that this case is of "such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court."

The District Court has found as a fact that present levels of AFDC payments in New York are barely at the subsistence level. *Rosado* v. *Wyman,* —— F.Supp. —— (EDNY 1969) (per Weinstein, J.). The proposed cuts of up to 20% would, therefore, consign one million persons to an existence below the subsistence level. The tragedy and

irreparable injury inherent in such a human catastrophe is, unfortunately, all too apparent. It is absolutely unthinkable to permit one million human beings to be reduced to a state of existence below the subsistence level prior to, at the very least, permitting the victims an opportunity to contest the legality of the proposed reductions. Yet, with the staying of the District Court's injunction and in view of the imminent recess of this Court, no meaningful opportunity to challenge the legality of the proposed AFDC reductions on the merits will exist prior to their implementation. The reductions will go into effect on July 1, 1969, plunging one million persons even deeper into poverty, despair and hunger, without an opportunity for review by this Court and in the face of a favorable determination by the District Court.

We submit that the District Court was correct in ruling that the proposed AFDC reductions are unlawful. However, unless this Court grants certiorari and reviews the issue on the merits, one million persons face the prospect of an unlawfully imposed summer of grinding poverty at lower than subsistence levels, with no legal recourse until this Court reconvenes in the autumn.

The imperative public importance of the narrow issue of statutory interpretation raised by this case, requires that it be settled by this Court prior to subjecting the members of the plaintiff class to an irreparable period of drastic deprivation.

Should this Court deem it inappropriate to grant certiorari herein, it is respectfully submitted that it possesses power pursuant to 28 U.S.C. 1651(a) to frame an appropriate extraordinary order staying the implementation of

the AFDC cuts pending the determination of their legality by this Court. Cf. *Phillips* v. *United States*, 312 U.S. 246, 254 (Mr. Justice Frankfurter).

Respectfully submitted,

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FRANZ S. J. LEICHTER
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Attorneys for Amici

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ROSADO ET AL. *v.* WYMAN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ROSADO ET AL. *v.* WYMAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Nos. 1539 and 1540. Decided June 23, 1969.

PER CURIAM.

The motions of Joseph Barbaro, et al., and American Civil Liberties Union, et al., for leave to file briefs, as *amici curiae*, are granted. The motion to expedite review is denied.

The application to vacate the stays granted by the Court of Appeals on June 11, 1969, and June 19, 1969, of the injunctions of the District Court presented to MR. JUSTICE BRENNAN, and by him referred to the Court, is denied.

The petition for a writ of certiorari before judgment in No. 1539 is denied. The appeal in No. 1540 is dismissed for want of jurisdiction. *Mengelkoch* v. *Industrial Welfare Commission, et al.*, 393 U. S. 83 (1968); *Wilson* v. *Port Lavaca*, 391 U. S. 352 (1968).

MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.